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No. 91-948-CFX
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Title: Church of the Lukumi Babalu Aye, Inc. and Ernesto
Pichardo, Petitioners
v.
City of Hialeah

Docketed:

November 19, 1991 Court: United States Court of Appeals for
the Eleventh Circuit

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NOTE: See 29.2 re dkt dt rec'd 121691 122091 c.a.
confirmed dt reh den-typo in pet

Entry	Date	Note	Proceedings and Orders
1	Nov 19 1991	G	Petition for writ of certiorari filed.
3	Dec 16 1991		Order extending time to file response to petition until January 20, 1992.
4	Jan 17 1992		Order further extending time to file response to petition until February 17, 1992.
5	Feb 13 1992		Brief amici curiae of James Andrews as Stated Clerk of Presbyterian Church, et al. filed.
7	Feb 14 1992		Brief of respondent Hialeah in opposition filed.
6	Feb 19 1992		DISTRIBUTED. March 6, 1992
8	Feb 24 1992	X	Reply brief of petitioners Church of Lukumi, et al. filed.
10	Mar 16 1992		REDISTRIBUTED. March 20, 1992
11	Mar 23 1992		Petition GRANTED. *****
13	Mar 30 1992		Order extending time to file brief of petitioner on the merits until May 26, 1992.
14	May 22 1992		Joint appendix filed.
15	May 22 1992		Brief of petitioners Church of Lukumi, et al. filed.
16	May 26 1992		Brief amicus curiae of Rutherford Institute filed.
17	May 26 1992		Brief amicus curiae of Council on Religious Freedom filed.
18	May 26 1992		Brief amicus curiae of United States Catholic Conference filed.
19	May 26 1992		Brief amicus curiae of Natl. Jewish Commission on Law and Public Affairs filed.
20	May 26 1992		Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
22	Jun 16 1992		Order extending time to file brief of respondent on the merits until July 17, 1992.
23	Jul 13 1992		Order further extending time to file brief of respondent on the merits until July 31, 1992.
24	Jul 17 1992		Brief amicus curiae of Washington Humane Society filed.
25	Jul 17 1992		Brief amici curiae of People for the Ethical Treatment of Animals, et al. filed.
26	Jul 28 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals-Eleventh Circuit and U.S. District Court, So. District/Fla. (BOX)
27	Jul 31 1992		Brief amici curiae of Humane Society of the United States, et al. filed.
28	Jul 31 1992		Brief of respondent City of Hialeah filed.

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No. 91-948-CFX

Entry	Date	Note	Proceedings and Orders
29	Jul 31 1992	Brief amici curiae of International Society for Animal Rights, et al. filed.	
30	Jul 31 1992	Brief amici curiae of Institute for Animal Rights Law, et al. filed.	
31	Jul 31 1992	LODGING consisting of two documents submitted by amici curiae, Institute for Animal Rights Law, et al.	
32	Aug 10 1992	CIRCULATED.	
33	Aug 21 1992	SET FOR ARGUMENT WEDNESDAY, NOVEMBER 4, 1992. (1ST CASE)	
34	Aug 28 1992	X Reply brief of petitioners Church of Lukumi, et al. filed.	
35	Nov 4 1992	ARGUED.	

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(1)

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

**CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,**

Petitioners,

vs.

CITY OF HIALEAH,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), this Court held that laws restricting religious exercise must be neutral and generally applicable. Is that rule violated by ordinances that forbid the killing of animals for ritual or sacrifice, but permit the killing of animals for a wide variety of secular reasons?

2. What must the City prove to show a compelling interest sufficient to justify a law that discriminates against religion in violation of *Employment Division v. Smith*? In particular:

a. Must the compelling interest justify the discrimination, or is it sufficient to have an interest that would justify a nondiscriminatory general prohibition?

b. Must the compelling interest be of extraordinary importance, or is any legitimate interest sufficient?

c. Must the compelling interest be based on actual harms, or is it sufficient to identify risks and challenge worshipers to prove that the risks can never come to fruition?

PARTIES TO THE PROCEEDING

All parties are named in the caption of the case. The Church of the Lukumi Babalu Aye, Inc. has no parent corporations or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ernesto Pichardo and Church of the Lukumi Babalu Aye, Inc. petition for a writ of certiorari to review the decision of the court of appeals in this case.

OPINIONS BELOW

The opinion of the district court (App. A3) is reported at 723 F. Supp. 1467 (S.D. Fla. 1989). The opinion and order of the court of appeals (App. A1, A50) are unreported.

JURISDICTION

The court of appeals entered judgment on June 11, 1991. It denied a timely petition for rehearing on August 23, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

This case involves the validity of Ordinances 87-40, 87-52, 87-71, and 87-72 of the City of Hialeah, Florida. Ord. 87-40 adopts by reference Fla. Stat. Ann. ch. 828. Of the provisions incorporated from chapter 828, petitioners challenge only § 828.12. Hialeah Resolutions 87-66, 87-90, and 87-109 were in pari materia with the challenged ordinances. The disputed portions of the ordinances, and relevant portions of two of the resolutions, are set out in the Appendix.

Petitioners do not challenge the provisions on humane slaughter in Fla. Stat. Ann. §§ 828.22, 828.23, and 828.24 (1976 & Supp. 1991), incorporated into Ord. 87-40. Relevant portions of these statutes are set out in the Appendix for comparison.

The case arises under the Free Exercise Clause, U.S. Const., amend. I, and 42 U.S.C. § 1983 (1988). These provisions are also set out in the Appendix.

STATEMENT OF THE CASE

This is a suit to enjoin enforcement of four ordinances enacted to prevent the practice of petitioners' religion in the City of Hialeah.¹ These ordinances forbid the killing of animals for purposes of ritual or religious sacrifice. In contrast, the City and the State of Florida permit the killing of animals for almost any plausible secular purpose.

The district court upheld the ordinances against petitioners' free exercise challenge. The court of appeals accepted the district court's findings of fact and affirmed its judgment "for the reasons set forth in Parts A, B, C(1) and C(3) of the 'Conclusions of Law' in the district court's memorandum opinion." App. A2. Thus, except for Part C(2) of the opinion, the reasoning of the district court is also the reasoning of the court of appeals.

Petitioners are the Church of the Lukumi Babalu Aye, Inc., and Ernesto Pichardo, one of the priests of the Church. The Church and its members practice an ancient African religion variously known as Yoba, Yoruba, or Santeria. App. A4. Yoruba originated some four thousand years ago. *Id.* at A5. It came to the Caribbean with slavery, *id.*, and to the United States with refugees from the Cuban revolution, *id.* at A6. Santeria and Lukumi are Cuban names for the religion. Roger Bastide, *African Civilisations in the New World* 115 (P. Green trans. 1971).

There are fifty to sixty thousand adherents of Santeria in South Florida, and an unknown number of

¹ Jurisdiction in the district court was based on 28 U.S.C. § 1331 (1988) and 28 U.S.C. § 1343 (1988).

adherents to other religions that practice animal sacrifice. App. A6. There may be a hundred million Santeria believers world wide. R10-392.²

An integral part of Santeria is the sacrifice of chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles. *Id.* at A9. Animals are sacrificed for birth, marriage, and death rites, for the cure of the sick, for the initiation of new members or priests, and for an annual celebration. R11-626, R12-810. The faith could not survive without animal sacrifice, because sacrifice is essential to the initiation of new priests. R12-862.

Because of persistent hostility and discrimination, Santeria has remained underground in Cuba and the United States. App. A5-A7. This case was precipitated when petitioners leased an abandoned used car lot and announced plans to open a church. The City responded with three resolutions and four overlapping ordinances restricting the religious sacrifice of animals. App. A52-A56. These ordinances were enacted "in a mob atmosphere." App. A27. Angry speakers denounced the Church and misstated its practices. One speaker said that if the Council permitted the Church to worship, the country would "regress into paganism." Pl. Ex. 10 at 4. Another said "the city would not please God." *Id.* at 5. Councilman Martinez argued that if the religion were "not permitted in Cuba, why bring it to the United States?" *Id.* at 6.

Following a nine-day bench trial, the district court held that the ordinances were intended to prevent religious sacrifice of animals, App. A28, that the ordinances burden petitioners' religion, *id.* at A42, and that "the ordinances are not religiously neutral," *id.* at

² Citations to the record in the district court are by volume and page number: in this instance, Record volume 10 at page 392.

A23. But it concluded that the City is not required to treat religion with neutrality. *Id.* at A40. It went on to hold that the ordinances are justified by several compelling interests. In reaching this conclusion, the district court equated compelling interest with any legitimate public policy. *Id.* at A44-A45.

First, the district court found two risks to health. The public health risk was that some unidentified practitioners of animal sacrifice sometimes dispose of carcasses in public places. *Id.* at A43. However, the district court found that there "have been no instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18. The private health risk was that worshipers often eat the uninspected meat of sacrificed animals. *Id.* at A43-A44. But defendants presented no evidence that anyone had ever become ill from eating this meat.

Second, the district court held that the City had a compelling interest in protecting animals. The animals are sacrificed by cutting the carotid arteries. *Id.* at A12. Cutting the carotid arteries is the humane method prescribed by Florida statute. Fla. Stat. Ann. § 828.23(7)(b) (1976). But the district court found that "there is no guarantee that a person performing the sacrifice in the manner described can cut through both carotid arteries at the same time." App. A13. Because of this and related uncertainties, the district court found that not all animals would die instantly. *Id.* at A13-A14, A45. It also found that the animals experience fear before the sacrifice, *id.* at A14, A45, and that petitioners could not guarantee that suppliers and other churches would care for the animals humanely before the sacrifice, *id.* at A46 & n.58.

Third, the district court found a compelling interest in preventing animal sacrifice in areas "not zoned for slaughterhouse use." *Id.* at A45. The court did not explain what this interest was or why it was compelling. The used car lot that petitioners selected for their

church was zoned for churches. *Id.* at A24 n.41. Moreover, parts of the city are rural, and there are farms within the city limits. R10-458, R15-1332.³

This case was tried before the decision in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990); the appeal was briefed and argued after *Smith*. Petitioners argued in the court of appeals that the ordinances violated *Smith* because they were neither neutral nor generally applicable. The City conceded that "neither the State of Florida nor the City of Hialeah has enacted a generally applicable ban on the killing of animals." Br. of Appellee in Ct. App. 21. Even so, the court of appeals found it unnecessary to "decide the effect of *Smith*." App. A2 n.1. Rather, it held that the ordinances were justified by compelling interests even if they violated *Smith*. The court of appeals relied on the district court's opinion with respect to three of the four compelling interests -- health risks, harm to animals, and zoning.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Rule Against Discriminatory Regulation of Religion.

Concurring separately in *Employment Division v. Smith*, Justice O'Connor said that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." 110 S. Ct. 1595, 1608 (1990). But that is exactly what Hialeah has done here. This case began when Petitioners announced their intention to worship in public. The City responded with

³ The district court also held that children attending the sacrifices might suffer psychological damage. App. A47. This holding was contained in the one part of the opinion (C(2)) on which the court of appeals expressly disclaimed any reliance. App. A2.

ordinances designed to suppress religious sacrifice of animals without affecting any other resident of Hialeah.

Hialeah forbids the religious sacrifice of animals; it does not forbid the killing of animals for food, for recreation, or for human convenience. The essence of the offense under Hialeah's ordinances is killing an animal for "sacrifice" in a "ritual or ceremony." All the issues in this case flow from this distinction between sacrificial and non-sacrificial killings of animals. The four overlapping, repetitive, and gerrymandered ordinances, and the after-the-fact rationalizations based on alleged compelling interests that the City does not pursue in any other contexts, are all attempts to disguise the central distinction in a way that might escape judicial scrutiny.

A. The Holding in *Smith*. *Employment Division v. Smith* rewrote the law of free exercise. Such a major doctrinal shift inevitably gives rise to new questions and poses old questions in new ways. This case presents a question at the heart of *Smith*: when is a law "neutral and generally applicable."

Smith holds that a "neutral, generally applicable regulatory law" may be applied to religiously motivated conduct without compelling justification. *Id.* at 1601. But *Smith* gives new emphasis to the requirement that laws restricting religion be neutral and generally applicable. That requirement is now the principal constitutional protection for free exercise of religion. It is of great importance for this Court to clarify what it means by "neutral and generally applicable," and to clarify the consequences of finding that a restriction on religious exercise is not "neutral and generally applicable."

Neither of the courts below considered the implications of *Smith*. The district court could not do so, because *Smith* had not yet been decided. The court of appeals refused to do so, holding that it could decide this case without deciding the effect of *Smith*. App. A2

n.1. The court of appeals relied on the district court's belief, erroneous even before *Smith*, that government has no obligation to treat religion neutrally. *Id.* at A41.

In at least three formulations, seemingly aimed at slightly different aspects of the problem, this Court in *Smith* insisted on neutrality and general applicability. First, *Smith* says a law is unconstitutional if it singles out religion for special regulation:

a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statutes that are to be used for worship purposes."

110 S. Ct. at 1599. The Court's hypothetical is this case: these ordinances forbid the killing of animals for worship purposes.

Second, a law is subject to stringent review if it is "specifically directed at [a litigant's] religious practice." *Id.* The Court elaborated on this point in a tax example, which it treated as equivalent to regulation:

if prohibiting the exercise of religion . . . is *not the object* of the tax *but merely the incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Id. at 1600 (emphasis added). This standard appears to refer to legislative purpose -- the "object" of the law -- and perhaps also to whether the anti-religious effect is such a dominant part of the law that it cannot be characterized as incidental.

Third, *Smith* says that if the legality of conduct depends upon a person's reasons for acting, religious reasons must be included among the reasons that the

law allows. *Id.* at 1603. This was the Court's rationale for reaffirming the line of unemployment compensation cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963). The states in those cases had accepted some reasons for quitting employment, but had refused to accept religious reasons. In *Smith*, the Court said that the unemployment compensation cases:

stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Id.

These three standards, given new emphasis in *Smith*, are mutually reinforcing aspects of the requirement that government be neutral toward religion. A law regulating religion must be religiously neutral on its face, it must be enacted for religiously neutral reasons, and if the state recognizes legitimate reasons for otherwise forbidden conduct, it must recognize religious reasons as equally legitimate.

B. The Ordinances. Two of the ordinances challenged in this case expressly subject religion to discriminatory regulation. All of them were enacted for the purpose of suppressing petitioners' religion. Most important, all of them are invalid because they recognize good and bad reasons for killing animals, and classify religious reasons among the bad. We will first review the discriminatory pattern common to all four ordinances, and then briefly review the text of each ordinance.

To implement its discriminatory purposes, the City created three statutory categories of killings of animals: to "sacrifice," meaning a killing for ritual; to "slaughter," meaning a killing for food consumption; and by implica-

tion, all other killings of animals.⁴ Sacrifice is absolutely forbidden. Ord. 87-71 § 3 (App. A54). Slaughter is confined to properly zoned slaughterhouses, Ord. 87-72 § 3 (App. A54), to small producers of beef and pork, *id.* § 6 (App. A54), or to other licensed establishments, Ord. 87-52, Code § 6-9 par. 3 (App. A53). Killings that are neither for food nor for ritual are regulated only by Ord. 87-40 (App. A52), which incorporates pre-existing state law.

1. Discrimination among reasons for killing animals. Neither the State of Florida nor the City of Hialeah has enacted anything remotely approaching a generally applicable ban on the killing of animals. The laws of Florida and of Hialeah provide for slaughterhouses and the killing of animals for food, and meat is sold in Hialeah. See, e.g., Fla. Stat. Ann. §§ 828.22 to 828.26 (1976 & Supp. 1991) (excerpted at App. A56-A57), incorporated in Ord. 87-40.

Hunting, fishing, and trapping in Florida are recreations of constitutional status, Fla. Const. art. 4 § 9, beyond the power of municipal regulation. *Bell v. Vaughn*, 21 So.2d 31 (Fla. 1945). The right to hunt on private land is a property right protected by the takings clause. *Alford v. Finch*, 155 So.2d 790, 793 (Fla. 1963). It is lawful to fish in Hialeah, and it is lawful for residents of Hialeah to go hunting and trapping and return with their kill. It is unlawful to help animals escape from hunters. Fla. Stat. Ann. § 372.705 (Supp. 1991).

Public officials may kill "injured or diseased" domestic animals. Fla. Stat. Ann. § 828.05 (Supp. 1991), incorporated in Ord. 87-40. Public officials and humane societies may kill "injured, sick, or abandoned domestic animals." *Id.* § 828.055, incorporated in Ord. 87-40.

⁴ See the definitions in Ordinances 87-52, 87-71, and 87-72 (App. A52-A54).

Public or private animal shelters and similar facilities may kill "stray, neglected, abandoned, or unwanted animals." *Id.* § 828.058, incorporated in Ord. 87-40. Animals removed from their owners may be killed "for humanitarian reasons" or if the animal "is of no commercial value." *Id.* § 828.073(4)(c)2, incorporated in Ord. 87-40. Animals may be killed or tortured "in the interest of medical science." *Id.* § 828.02 (1976), incorporated in Ord. 87-40. It is lawful to exterminate any animal that is "undesirable," *id.* § 482.021(17) (1991), and property owners may put out poison in their yards and enclosures, *id.* § 828.08 (1976). Hialeah has not interfered with the sale of lobsters to be boiled alive, R15-1336, and the record does not show that it has interfered with the practice of feeding live rats to pet snakes.

In short, there are many reasons for killing animals, and the City has divided them into acceptable and unacceptable reasons. Animals may be killed for food or for sport, because they are sick or injured, or merely because they are "stray," "unwanted," "undesirable" or "of no commercial value." According to the City, these are all acceptable reasons for killing animals. But religious faith is an unacceptable reason. Religion is almost the only unacceptable reason for killing an animal in Florida. Petitioners have found no reported prosecution in Florida for an unaggravated killing as distinguished from torture or cruelty to a living animal.⁵ If the City

⁵ *But cf.* Fla. Atty. Gen'l Opinion 90-29 (1990), expressing the view that killing animals and using the carcasses to train greyhounds violates the law against "unnecessary" killings, Fla. Stat. Ann. § 828.12(1) (Supp. 1991) (App. A56), because this practice "is outside the usual course of business for this industry." This opinion appears to be inconsistent with *Kiper v. State*, 310 So.2d 42 (Fla. App. 1975), which holds that the use of live rabbits to train greyhounds is not "unnecessary" within

recognizes that there are acceptable reasons for killing animals, then it must classify religion among those acceptable reasons. This is the lesson of the unemployment compensation cases as reinterpreted in *Smith*. 110 S. Ct. at 1603.

The courts below erred because they misunderstood this fundamental point. The court of appeals relied on the district court's conclusion that the ordinances were valid "even if the use of the words 'ritual' and 'ceremony' are understood as targeting primarily religious conduct." App. A40. The district court thought that government could target religion because "[s]trict religious neutrality is not required." *Id.* The district court supported this proposition by citing establishment clause cases, including a summary affirmance upholding a statute that *exempted* ritual slaughter from restrictive regulation. *Id.*, citing *Jones v. Butz*, 419 U.S. 806 (1974),

the meaning of § 828.12(1). The use of live rabbits is now forbidden by an express statutory provision; lack of necessity is not an element of the new offense. Fla. Stat. Ann. § 828.122(2)(a) (Supp. 1991).

The Hialeah ordinances may forbid the killing of animals in secular rituals, such as a fraternity initiation. But this purely hypothetical possibility does not affect the analysis. Hialeah does not satisfy its obligation of neutrality by treating religious reasons like the worst-treated, least-approved secular reasons. Rather, the status of being a constitutional right requires Hialeah to treat religious reasons at least as well as it treats fully acceptable secular reasons. In any event, there was no evidence that animals are killed in secular rituals in Hialeah. The district court recognized that the ordinances have no secular applications when it refused to make an exception for Santeria: "Any contemplated exception would have to cover all religions. The exception would, in effect, swallow the rule." App. A47.

affirming mem. 374 F. Supp. 1284 (S.D.N.Y. 1974). But none of the cases cited upheld a discriminatory restriction on religious exercise. This Court has held that legislatures may exempt religion from regulation, *Smith*, 110 S. Ct. at 1606; *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), but legislatures may not regulate religion except as an incidental application of neutral and generally applicable law.

An essential element of the offense of killing animals in Hialeah is the motive for the killing. Because its ordinances discriminate against religious motivation, they are invalid as applied to religious practice.

2. The purpose to suppress religion. The record is clear that these ordinances did not have a religiously neutral purpose. The district court found that these ordinances were "prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals," and that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." App. A28. In the language of *Smith*, these ordinances were "specifically directed" to religious conduct; it was the "object," and not merely "the incidental effect" of these ordinances, to suppress worship services. 110 S. Ct. at 1600. The City claims that the ordinances are neutral among religions, because they forbid all religious sacrifice of animals. But they are not neutral toward religion. Their purpose was to suppress petitioners' religion and all similar religions in the City.⁶

3. The textual implementation of the discriminatory purpose. It is necessary to briefly review the text of the individual ordinances to show how each

⁶ Even the claim of neutrality among religions is doubtful. An implicit exemption for Kosher slaughter is discussed *infra* at 27.

singles out religious sacrifice, thus squarely presenting the issue of neutrality and general applicability.

a. Ord. 87-71. § 3 of Ord. 87-71 makes it unlawful "to sacrifice any animal." App. A54. § 1 defines "sacrifice" to mean "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at A53. Because this ordinance singles out religious conduct for separate prohibition, it is facially unconstitutional. Only sacrifice is an offense, and under the definition, the essence of sacrifice is killing an animal in a "ritual or ceremony."⁷

b. Ord. 87-52. Ord. 87-52 is more complex, but the bottom line is the same. Ord. 87-52 added §§ 6-8 and 6-9 to the City Code. App. A52-53. Paragraph 1 of § 6-9 makes it unlawful to kill or "sacrifice" an animal "intending to use such animal for food." *Id.* at A53. Paragraph 3 permits the licensed slaughter of animals "specifically raised for food purposes." *Id.* So killings "specifically" for food are exempt under Paragraph 3, and killings not for food are exempt under Paragraph 1. But Paragraph 2 forbids killing or sacrifice "for any type of ritual," "whether or not" the animal is later consumed as food. *Id.* When the smoke clears, the references to food are irrelevant, and only ritual sacrifice is forbidden.

c. Ord. 87-40. Ord. 87-40 enacts Fla. Stat. Ann. ch. 828 as a city ordinance. App. A52. § 828.12(1) (Supp. 1991) makes it a misdemeanor to "unnecessarily" kill an animal. App. A56. The City contends that religious sacrifice of animals is unnecessary, and therefore unlawful. The City obtained an opinion of the Florida Attorney General to this effect.

⁷ Petitioners do not object to neutral prohibitions on torment, torture, or mutilation. See Fla. Stat. Ann. § 828.12 (Supp. 1991), incorporated in Ord. 87-40.

Fla. Atty. Gen'l Opinion 87-56 (1987). But of course neither Hialeah nor the Attorney General has power to decide that religious worship is unnecessary, or to render theological judgment on what rituals are necessary to worship. Neither can take sides "in controversies over religious authority or dogma." *Smith*, 110 S. Ct. at 1599.

d. Ord. 87-72. § 1 of Ord. 87-72 defines "slaughter" to mean "the killing of animals for food." App. A54. § 3 forbids "slaughter" except in places zoned as a slaughter house. *Id.* § 6 exempts small producers of hogs and cattle. *Id.*

Given the City's distinction between "sacrifice" and "slaughter," this Ordinance appears inapplicable to petitioners. Indeed, if petitioners are engaged in "slaughter," all these ordinances are pre-empted by Florida statutes. The City's response to the pre-emption claim below was that petitioners are not engaged in slaughter. Br. of Appellee in Ct. App. 46-47.

The City's attempt to apply Ord. 87-72 depends on the opposite contention. By focusing on the secondary fact that many of the sacrificed animals are subsequently eaten, the City misclassifies the petitioners' church as a slaughterhouse. This misclassification enables the City to exclude petitioners' church, because no land in the city is zoned for slaughterhouses. App. A33 n.46.

As a deputy city attorney testified, the petitioners' church is not a slaughterhouse. R15-1345. It is not in the business of selling food in the open market, and the numbers of animals sacrificed are a tiny fraction of the numbers killed in a slaughterhouse. § 6 recognizes that even small commercial operations are not slaughterhouses and do not require the same regulation as slaughterhouses. But it exempts only the small scale slaughter of cattle and hogs. App. A54. It does not exempt petitioners' goats and chickens.

It is not neutral to apply slaughterhouse rules to petitioners' sacrifices unless the City applies slaughter-

house rules to all the other killings of animals in the City. The City cannot avoid all scrutiny of its justifications by arbitrarily equating any killing of an animal for food with the operation of a slaughterhouse.

Employment Division v. Smith leaves precious little protection for the free exercise of religion. If this Court permits even that protection to be evaded by clever drafting and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause. This Court has long recognized that legislatures and city councils could readily suppress unpopular groups unless courts scrutinize legislative motive and legislative gerrymanders. Cf. *Davis v. Bandemer*, 478 U.S. 109 (1986) (political gerrymandering); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racial gerrymandering); *Guinn v. Oklahoma*, 238 U.S. 347 (1915) (grandfather clause); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discriminatory enforcement). If ordinances like these from Hialeah are allowed to stand, it will be open season on unpopular religions.

II. The Zoning Rationale Below Conflicts With a Free Exercise Decision of the Fifth Circuit and With Free Speech Decisions of This Court.

At one point, the courts below characterized the ordinances as mere zoning laws. App. A32-A34. That characterization is erroneous, for reasons to be explained. But even if that characterization were accepted, the decision below would conflict with other decisions protecting First Amendment rights from restrictive zoning.

The Fifth Circuit has held that the zoning power may not exclude a church from all accessible locations within the city. *Islamic Center, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). To similar effect is this Court's decision in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), holding that a municipality cannot use the zoning power to exclude all live entertainment

from its borders. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 76-77, quoting *Schneider v. State*, 308 U.S. 147, 163 (1939).

These cases are not affected by *Employment Division v. Smith*. Neither Florida nor Hialeah has any neutral, generally applicable law against killing animals. In the absence of such a law, religious sacrifice of animals is a constitutionally protected activity. A constitutionally protected religious activity cannot be zoned out of the City and confined to the hinterlands.

Even if the ordinances were neutral and generally applicable, the zoning rationale would be within *Smith*'s exception for "individual" consideration. 110 S. Ct. at 1603. Zoning, with its attention to individual parcels and development plans, and its elaborate provisions for waivers, variances, and non-conforming uses, inherently involves the sort of individualized consideration in which religion must be treated equally with other favored interests.

In any event, these ordinances are not zoning laws. The zoning characterization ignores the context of these ordinances, the express purpose of preventing the exercise of petitioners' religion, and the gerrymanders to implement that purpose. The ordinances do not confine petitioners' worship to an appropriate zone; they exclude it from the City. On the other hand, the ordinances do not exclude all killing of animals from the City. Veterinarians, humane societies, pet owners, exterminators, seafood restaurants, fishers, and farmers may kill animals in the City. The zoning rationale cannot disguise the patent discrimination against religion in these ordinances.

III. Important Questions Concerning the Compelling Interest Test Were Resolved in Ways that Conflict with Decisions of this Court.

A. **Defining Compelling Interest.** *Employment Division v. Smith* also puts the compelling interest test in a new light. *Smith* divides laws restricting religious exercise into those that are religiously neutral and those that are not. Laws that are religiously neutral are immune from strict scrutiny. On the other hand, laws that are not religiously neutral present special problems of justification. Simply put, it is hard to imagine a compelling need to discriminate against religion. Certainly, no such compelling need is presented on this record.

The decision below also conflicts with this Court's interpretation of the compelling interest test in cases prior to *Smith*. These conflicts remain important, because the compelling interest test after *Smith* is at least as stringent as it was before *Smith*. A principal part of this Court's rationale for restricting the *scope* of the compelling interest test was to maintain its *stringency* in the narrower range of cases to which it would apply. *Smith* cautions against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test." 110 S. Ct. at 1605.

In the courts below, the compelling interest test was watered down beyond recognition. The holding below raises three distinct subquestions about the meaning of the test.

1. **Can the City rely on interests that it does not pursue in secular contexts?** The compelling interest must fit the law it is alleged to justify. *Smith* surely means the City must show a compelling reason for *discriminating against religion*. The City cannot suppress religious worship in pursuit of interests that it does not

pursue in secular contexts. Rather, the City must show that the religious practice of animal sacrifice poses some special danger that is not posed by any lawful reason for killing animals, that the City's interest in suppressing this special danger is compelling, and that no less restrictive means would satisfy its interest.

The courts below did not consider the impact of *Smith* on the compelling interest test. Neither court required the City to prove a compelling interest in discriminating against religion. Rather, the City was permitted to rely on interests that it does not pursue in secular contexts.

2. Are all legitimate interests compelling? The district court reduced the requirement of a "compelling" interest to a requirement of a rational or legitimate interest. This appears most clearly in the following passage, from a part of the opinion on which the court of appeals relied:

Equally compelling is the City's interest in the protection of animals from cruelty and unnecessary killing. "It has long been the public policy of this country to avoid unnecessary cruelty to animals." *Humane Society of Rochester v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986). The Florida Supreme Court observed more than two decades ago that "it is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968).

App. A44-A45.

This is the entire discussion of whether the City's interest in protecting animals is compelling. By treating the two cited cases as dispositive on the question whether a compelling interest was at stake, this passage assumes that any "public policy" or any "valid exercise of

the police power" satisfies the compelling interest test. And because the district court treated the interest in protecting animals as "equally compelling" with the alleged threats to health, it appears that this watering down of the compelling interest test affected the entire opinion. The district court's approach "relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides" in cases not subject to strict scrutiny. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141-42 (1987).

It is not every or even most legitimate government interests that are compelling. "Compelling" does not merely mean a "reasonable means of promoting a legitimate public interest." *Id.* at 141. Compelling does not merely mean "important." *Thomas v. Review Board*, 450 U.S. 707, 719 (1981). Rather, "compelling interests" include only those few interests "of the highest order," *Smith*, 110 S. Ct. at 1605; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests," *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This Court explains "compelling" with superlatives: "paramount," "gravest," and "highest order." Petitioners believe that these words mean what they say. The courts below did not.

Even these interests are sufficient only if they are "not otherwise served," *Yoder*, 406 U.S. at 215, if "no alternative forms of regulation would combat such abuses," *Sherbert*, 374 U.S. at 407, and if the challenged law is "the least restrictive means of achieving" the compelling interest, *Thomas*, 450 U.S. at 718.

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children. 406 U.S. at 219-29. The education of children is important, and the first two years of high

school are basic to that interest. But the state's interest in the first two years of high school was not sufficiently compelling to justify a serious burden on free exercise. *Smith* reaffirmed *Yoder*. 110 S. Ct. at 1601.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment. *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963), reaffirmed in *Smith*, 110 S. Ct. at 1603. The City must show something more compelling than saving money, more compelling than educating Amish children.

This Court has found a compelling interest in only three free exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to national survival or to express constitutional norms: national defense, *Gillette v. United States*, 401 U.S. 437 (1971), collection of revenue, *United States v. Lee*, 455 U.S. 252 (1982), and racial equality in education, *Bob Jones University v. United States*, 461 U.S. 574 (1983). The Court feared that "the tax system could not function" if every taxpayer could object to expenditures that allegedly violated his religious beliefs. *United States v. Lee*, 455 U.S. 252, 260 (1982).

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text. See Douglas Laycock, Book Review, 99 Yale L.J. 1711, 1744-45 (1990). The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. If the City can overcome a constitutional right by invoking any legitimate public policy, or any valid exercise of the police

power, constitutional rights are reduced to mere exhortations. What the City has shown falls far short of a compelling interest.

3. Must the City prove actual harms, or must worshipers disprove all possible risks? Under this Court's precedents, the City must prove that serious harms are actually occurring as a result of petitioners' worship services. It cannot rely on speculation about what might happen, or on theoretical risks unconfirmed by experience. Mere "fear or apprehension" cannot be enough, because government can always show fear and apprehension; "any departure from absolute regimentation may cause trouble." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). "[O]ur Constitution says we must take this risk." *Id.*

Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life." 406 U.S. at 224. This Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." *Id.* at 224, 225. Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But this Court rejected them all for lack of evidence that they were really happening. *Frazee v. Illinois Dept. of Employment Security*, 109 S. Ct. 1514, 1518 (1989); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

The district court turned this evidentiary requirement on its head, repeatedly requiring the Church to prove that no animal sacrifice would ever cause harm. See

App. A13 ("there is no guarantee" that all arteries will be cut simultaneously); *id.* at A43 ("a risk of physical harm"); *id.* at 45 ("Plaintiffs have not shown" that regulating care of animals and disposal of carcasses would satisfy the City's concerns); *id.* at A46 n.59 ("Pichardo could give this Court no assurance" that deviant practitioners would obey regulations). Religious worshipers are not required to prove that there is no risk; instead the City is required to prove that serious harms are actually happening.

B. Applying the Compelling Interest Test. These questions about the City's burden of justification and the meaning of the compelling interest test are of general importance to all cases in which government tries to justify restrictions on constitutional rights. But these important questions are best answered in the context of particular facts. This Court can define "compelling interest" with synonyms and abstract explanations, but it can effectively convey its meaning only by holding that particular facts do or do not justify discriminatory regulation of religion. With complex legal concepts like compelling interest, the "outer limits will be marked out through case-by-case adjudication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

The record in this case squarely presents these questions about the City's burden of justification. The courts below reached legal conclusions of compelling interest on the basis of expert testimony to specific facts. The issue presented to this Court is whether these specific facts justify discriminatory restrictions on religion. That is a legal question on which this Court has the final word.

To answer that legal question, this Court must "make an independent examination of the whole record." *Bose Corp. v. Consumers' Union, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). This independent examination of the record is for a limited and defined purpose. The district

court accepted the testimony of the City's experts, and petitioners do not ask this Court to reconsider that determination. But the district court's findings must be read in light of the specific facts to which those experts testified. This Court must examine the concrete facts to which the experts testified, and separate those facts from conclusions that depend on judgments of law, policy, or degree.

Petitioners contend that when this separation is made, the evidence simply will not support a legal conclusion of compelling interest in discriminatory suppression of animal sacrifice. Most of the City's broad claims of government interest are speculative and unproven, and none of them is sufficiently important to be compelling. In analogous secular contexts, the City either does not pursue these interests at all, or it pursues them to a lesser degree and by less restrictive means.

1. The alleged threat to public health. The trial judge found a threat to public health, because some unidentified practitioners of animal sacrifice sometimes improperly dispose of carcasses in public places. App. A43. Dead animals harbor germs, and the germs can be spread by other animals that come to feed on the carcass. But the judge found that "[t]here have been *no* instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18 (emphasis added).

The district court's finding of increased risk was based on the testimony of Mr. Walter R. Livingstone, environmental administrator for the Dade County Department of Public Health. But he testified that the problem comes from many sources, including restaurants, public buildings, veterinarian's offices, and ordinary garbage. R11-556, 566, 590. Indeed, he denied that animal sacrifice presents any special problem: "I don't believe what we're talking about here today has anything to do with animal sacrifice." R11-592. "As I said

before, you are trying to change this into animal sacrifice, and I haven't been speaking of animal sacrifice at all." R11-594. Similarly, Ms. Zorida Diaz Albertini, Director of Animal Services for Dade County, testified about dead animals in the public right of way. Her testimony indicated that most such animals are dogs, cats, and other species that are not sacrificed. R10-452.

Thus, the problem of improperly discarded sacrificial animals appears to be a rather small part of the problem of dead animals, which in turn is a very small part of the problem of organic garbage. The City has not banned all ownership of cats and dogs to keep a few of them from being hit by cars, but it has banned all sacrifice of animals to keep a few of them from being improperly discarded.

The City can address the problem of improper disposal directly, by requiring proper disposal and by prosecuting violators. It is not difficult to properly dispose of a sacrificed animal. Mr. Livingstone testified that it is safe to put the carcass in a plastic bag and to put the plastic bag in a garbage can. R11-555. It would be especially easy to detect improper disposals from a fixed and public place of worship, such as that proposed by petitioners.

2. The alleged threat to private health. The courts below also found a threat to private health. Many of the sacrificed animals are eaten, and the meat is not inspected by any public authority. But there was no evidence that any person has ever become ill from eating a sacrificed animal.

Once again, the City relies on an interest that it pursues only with respect to religious sacrifice. Hunters eat their kill, and fishers eat their catch, but neither Florida nor Hialeah requires its hunters and fishers to submit this meat for public inspection. A Florida statute requires inspection of commercially sold meat. Fla. Stat. Ann. § 585.70 et seq. (1991 Supp.). But the statute has

several express exemptions, including slaughter of animals raised at home for the use of the owner and "members of his household and nonpaying guests and employees." § 585.88(1)(a).

Thus, the relevant public policy is that the owner of an animal can kill it for non-commercial food consumption, and that any risk from this activity is too small to justify government regulation. The interest in eliminating this small risk does not suddenly become compelling when the animal is sacrificed as part of a worship service.

3. The harm to animals. The district court held that the City has a compelling interest in protecting animals from "cruelty and unnecessary killing." App. A44. The holding that animals are unnecessarily killed depends on the impermissible conclusion that religious worship is unnecessary. See *supra* at 13-14.

The trial judge found a compelling interest in preventing three kinds of cruelty. Two of these are obviously discriminatory. He found that the animals experience fear prior to sacrifice, and that some suppliers of animals inadequately feed and house them. App. A17-A18, A45. But no level of government attempts to prevent these problems in secular contexts, so they cannot be compelling reasons for preventing religious worship. One of the City's experts testified that animals would experience similar fear in a commercial slaughterhouse or any other strange place. R12-911. Another testified that no level of government regulates the care of farm animals. R13-1014, 1016. In any event, the commercial suppliers of sacrificial animals can be regulated directly. Abuses there are not a reason to suppress petitioners' worship.

We come then to the essence of the alleged cruelty issue. The animals are sacrificed by cutting the carotid arteries with a single knife stroke. App. A12. Cutting the carotid arteries is approved as humane by Florida

and federal statutes on Kosher slaughterhouses. Fla. Stat. Ann. § 828.23(7)(b) (1976); 7 U.S.C. § 1902(b) (1988). The other approved method, used in non-Kosher slaughterhouses, is to render the animal unconscious before slaughter. 7 U.S.C. § 1902(a) (1988).

Based on the testimony of the City's expert, Dr. Fox, the trial court found that "there is no guarantee" that the priest can cut all the arteries at the same time, that some animals have third and fourth carotid arteries, and that sometimes, the arteries close themselves off, thus delaying death. App. A13. Dr. Fox testified that if all the arteries were severed simultaneously, the animal would become unconscious "very rapidly." R12-891. But if fewer than all the arteries were severed, the animal would become unconscious "slowly," over a period of "many seconds to minutes." *Id.*

The City's alleged compelling interest is to protect animals from this brief period of consciousness in those cases in which the priest fails to sever all arteries simultaneously and does not realize that he has failed. Dr. Fox did not estimate, and the trial judge did not find, how often such errors would occur. This risk of brief harm to animals is simply insufficient to justify suppression of a constitutionally protected human worship service.

Dr. Fox's specific testimony reveals the standards on which he based his conclusion that sacrifice is inhumane. Under Dr. Fox's standards, a method of sacrifice is unacceptable if it takes "seconds to minutes" when something goes wrong, and if no one can guarantee that nothing will ever go wrong. If applied generally, these standards would shut down Kosher slaughterhouses as well as Santeria worship services. Dr. Fox thought the Jewish and Muslim knife stroke from the front of the throat is somewhat more reliable than the Santeria knife stroke, which goes from one side through to the other. R12-887. But he testified that animals killed in Kosher slaughterhouses often fail to die immediately, R12-881,

and he supports more restrictive regulation of Kosher slaughterhouses. R12-902, 917.

No legislature has applied Dr. Fox's standards to Kosher slaughterhouses, but the district court relied on Dr. Fox's standards to uphold suppression of Santeria. Indeed, the district court held that Kosher slaughter is exempt even from Hialeah's ordinances, because Kosher slaughter is for the primary purpose of food consumption and only secondarily for religion. App. A31. Such discrimination between religions violates the Establishment Clause, *Larson v. Valente*, 456 U.S. 228 (1982), as well as the free exercise rights of Santeria. And such discrimination between faiths wholly undermines the City's claim that its interest is compelling.

In secular contexts, state and local policy permits practices that inflict much greater and longer lasting pain on animals. The humane slaughter rules do not apply at all to any person slaughtering and selling "not more than 20 head of cattle nor more than 35 head of hogs per week." Fla. Stat. Ann. § 828.24(3) (Supp. 1991) (App. A57), incorporated in Ord. 87-40. Neither state nor local law requires exterminators to use the most humane methods of killing animals. It is permissible to inflict "pain and suffering" on animals "in the interest of medical science." *Id.* § 828.02 (1976), incorporated in Ord. 87-40.

State and local policy on hunting, fishing, and trapping shows little concern for the suffering inflicted on animals. Using one animal to hunt another is expressly exempted from the animal cruelty statutes. *Id.* §§ 828.122(6)(b), (6)(e) (Supp. 1991), incorporated in Ord. 87-40. Trapping is legal in Florida. *Id.* §§ 372.57(2)(i), (2)(j), (3). Florida has hunting seasons in which modern firearms are forbidden but muzzle-loading guns are permitted, *id.* § 372.57(5)(c), and seasons in which firearms are forbidden but archery is permitted, *id.* § 372.57(5)(d). These weapons are less likely to achieve a clean kill; animals may suffer permanent

injury, festering wounds, or slow death. Dr. Fox was opposed to archery hunting. R12 at 912-13. But Florida actively encourages these risks, and residents of Hialeah may participate.

In short, Florida and Hialeah permit humans to inflict much greater suffering on animals for a wide variety of secular reasons. Once again, the allegedly compelling policy is applied only to religion.

4. The interest in zoning. Finally, the district court said that "the City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the City not zoned for slaughterhouse use." App. A45. Neither court explained this holding, and neither court made any findings to support it.

There is no finding and no evidence that religious sacrifice of animals present the same problems as slaughterhouses. Indeed, the City's evidence is to the contrary. A Deputy City Attorney testified that a church sacrificing animals is not a slaughterhouse. R15-1345. The City persuaded the trial court that Santeria's secrecy makes regulations unenforceable. App. A46 n.59. A practice that is difficult to detect even when you search for it is not a compelling zoning problem.

The pattern is the same with respect to all the alleged compelling interests. If the Court will examine the specific facts to which the City's experts testified, no compelling interest is shown. If the Court accepts the experts' conclusory labels, like "increased risk" or "inhumane," the effective power to decide the controlling question of law is transferred from the courts to the expert witnesses. Only courts can decide whether the specific facts in evidence show a compelling interest sufficient to justify suppression of the central religious ritual of an ancient but unpopular minority faith.

CONCLUSION

Hialeah has not made it a crime to kill animals. Rather, Hialeah has made it a crime to sacrifice animals to your God. This Court should grant certiorari to consider the important constitutional questions raised by this extraordinary prohibition.

Respectfully submitted,

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DO NOT PUBLISH
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5176

D.C. Docket No. 87-1795-CIV-EPS

CHURCH OF THE LUKUMI BABALU AYE,
INC., a non-profit corporation and
ERNESTO PICHARDO,

Plaintiffs-Appellants,

versus

CITY OF HIALEAH,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 11, 1991)

Before FAY and COX, Circuit Judges, and HENDER-
SON, Senior Circuit Judge.

PER CURIAM:

The district court made extensive findings of fact, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), and no party argues that the record does not support these findings. In light of these findings, the district court properly concluded that the ordinances passed by the City of Hialeah are consistent with both state statutes and the United States Constitution for the reasons set forth in Parts A, B, C(1) and C(3) of the "Conclusions of Law" in the district court's memorandum opinion dated October 5, 1989.¹ For this reason we need not consider the district court's reasoning contained in Part C(2) of the "Conclusions of Law" of the court's opinion. We thus affirm the judgment of the district court.

AFFIRMED.

¹ Although the district court employed an arguably stricter standard in analyzing whether the ordinances violate the United States Constitution than the Supreme Court did in Employment Div., Dep't of Human Resources v. Smith, ___ U.S. ___, 110 S.Ct 1595 (1990) (which was decided after the district court issued its memorandum opinion and order), we need not decide the effect of Smith in this case.

[723 F. Supp. 1467]

**CHURCH OF THE LUKUMI BABALU AYE, INC.,
and Ernesto Pichardo, Plaintiffs,**

v.

CITY OF HIALEAH, Defendant.

No. 87-1795-CIV-EPS.

United States District Court,
S.D. Florida,
Miami Division.

Oct. 5, 1989.

[1469]

MEMORANDUM OPINION

SPELLMAN, District Judge.

FINAL JUDGMENT AND
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS CAUSE was tried before the Court without a jury on July 31, and August 2, 3, 7, 8, 9, 11, 14, and 15, 1989. Plaintiffs brought this lawsuit pursuant to 42 U.S.C. § 1983 to enjoin, declare unconstitutional, and recover damages for the alleged deprivation of Plaintiffs' constitutional rights, under the First, Fourth and Fourteenth Amendments, by the CITY OF HIALEAH. Plaintiffs claim that Defendant's passage of certain ordinances and resolutions, and Defendants' alleged "process of discouragement, harassment, threats, punishment, detention, and threats of prosecution" violate Plaintiff's constitutional rights. The Church specifically is seeking the right of the Church to perform animal sacrifices on Church premises, and for the right of

Church members to perform sacrifices in their own homes.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, which provides for original jurisdiction of all civil actions arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343, which provides for jurisdiction of actions brought pursuant to 42 U.S.C. § 1983. Upon careful consideration of the record, the exhibits, and the memorandum filed by the parties, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff, CHURCH OF THE LUKUMI BABALU AYE, INC. ("the Church"), is a not-for-profit corporation organized under the laws of the State of Florida in 1973.¹ Plaintiff, ERNESTO PICHARDO ("Pichardo"), is President of the Church and holds the religious rank of "Italero." Defendant, CITY OF HIALEAH ("the City"), is a municipal corporation situated in the State of Florida.

A. Background

The Church promotes the Lukumi religion, generically referred to as Yoba or Yoruba, and commonly referred to as Santeria. Yoba or Yoruba is an ancient

¹ Although this Church was incorporated in 1973, the only information this Court has regarding the Church is from Pichardo's testimony. From that testimony, it appears that the Church's activities began at the time that the events leading up to this lawsuit were initiated; i.e., at the time that the Church first leased the property in Hialeah and attempted to obtain their licenses. This Court has no information regarding any Church activities before that time.

religion that originated almost 4000 years ago with the Bantu people--the proto-group of the Yoruba people of West Africa, who live mainly in Southern Nigeria. Yoruba is one of the three indigenous religions of the Yoruba people and is practiced openly in Nigeria today.

During the 16th, 17th and 18th centuries, great numbers of Yoba practitioners were enslaved and brought to the eastern region of Cuba,² where the practice of their native religion was forbidden. Slaves were expected to become Christians,³ and practitioners of Yoba were persecuted by the authorities and discriminated against by the populace.

The slaves, to escape the severe penalties and social stigma, began to express the Yoba faith through the use of Catholic [1470] saints and symbolism.⁴ This syncretism⁵ permitted slaves to practice Yoba, or Santeria, while appearing to practice Catholicism.

Thus, for 400 years, Santeria was an underground religion practiced mostly by slaves and the descendants

² This area was at one time called Oriente Province. It is now split up into two provinces.

³ One of the justifications for slavery often used by the Spanish government was that they were not really engaging in slavery per se, but that they were really engaged in the business of saving souls. Thus, before slaves were loaded onto slave ships, they were often baptized. The slave ships themselves were often given names like "Jesus" and "Estella" (Hope).

⁴ For example, because Saint Peter was associated with iron, the keys to heaven, Yoba practitioners saw Saint Peter as Shango, the god of lightening and thunder.

⁵ Syncretism is a term which refers to the blending of two cultures.

of slaves. Eventually it spilled over from the black population to the white population. However, Santeria was seen as backward, as the religion of slaves and remained underground, first from fear of persecution, and later, from fear of discrimination and social stigma.

Santeria first came to the United States with the Cuban exiles who fled the Castro regime in the late 1950's and early 1960's. Other Afro-Caribbean religions, like Voodoo, Macumba, and Palo Mayombe, arose from the same circumstances in other Caribbean islands, and also exist in South Florida, brought here by natives of those islands.⁶ In total, there are approximately 50,000 to 60,000 practitioners of Santeria in South Florida today, and an untold number of people who practice animal sacrifice.

Santeria remains an underground religion and the practice was not, and is not today, socially accepted by the majority of the Cuban population. Additionally, Santeria has lost some contact with its own past in Cuba. Most religious activity takes place in individual homes by extended family groups. There is little or no intermingling of the groups, and few practitioners know others outside their own group that practice Santeria. Santeria has remained underground because most practitioners fear that they will be discriminated against. The religion has taken on a private, personal tone that

⁶ It is often very difficult for an outsider to tell from religious relics which Afro-Caribbean religion is being practiced. That is one of the problems in identifying the source of the animal carcasses that are left in public. It is hard to tell if they have been left by practitioners of another Afro-Caribbean religion or by practitioners of Santeria whose methods and interpretations differ from what Pichardo believes are the true and universal tenants [sic] of Santeria.

is very different than the way that it is practiced in Nigeria. Although Pichardo feels that the religion would become more open if the Church was allowed to practice its rituals openly, Dr. Lisandro Perez, a sociologist, testified that in his opinion, the outcome of this case would not necessarily affect the degree of which Santeria was practiced in private.⁷

Pichardo testified that although he holds the priesthood rank of "Italero," he can not estimate the number of practitioners in the City of Hialeah, nor does he know how many of the members of his Church are priests, or hold any particular rank in the priesthood.⁸ Additionally, although Pichardo claims that there are about ten Italeros in Dade County, he has only met two. There is an annual conference of Santeria priests held in New York, but Pichardo testified that he has never been invited to one, nor attended one.

Santeria has an interrelationship of beliefs with conduct of life, i.e., holidays, sabbath, days of worship. There are ceremonies for life cycle events such as child birth, marriage and death rites. Beliefs and practices have remained fairly constant over time, but are based on the interpretation of an oral tradition. There is no organized worship, with a centralized authority, and, with the exception of written tenets prepared by Pichardo

⁷ Dr. Perez stated that "[t]here may be a lot of Santeros who may not wish to place their beliefs on a public sort of marketplace."

⁸ The rank of "Italero" is the second highest rank in Santeria although there are different levels of knowledge within that rank. The rank above Italero is "Babalawo." Pichardo testified that he did not know if any member of his Church held the rank of "Babalawo."

(possibly in preparation of this lawsuit), no written code or tradition appears to exist.⁹

[1471] Pichardo testifies that priests are trained as apprentices by other priests, guided by the oral traditions. Different priests perform different functions, such as divination, and sacrifice, and a priest must train in each different discipline he wishes to pursue. There is, however, no central authority which establishes, or verifies, a priest's training or credentials.¹⁰

⁹ Pichardo prepared a "Code of Beliefs" and "Code of Ethics" that he believes correctly sets forth the oral traditions (as taught to him) which in turn reflect the universal principles of the religion. This document is intended by Pichardo to take the oral tradition and turn it into a written tradition. Pichardo testified that this [1471] document had gone through the process of being analyzed by a group of elder priests; however, Pichardo gave no evidence to support this claim, and in fact has consistently testified that he doesn't even know which members of the Church are priests.

¹⁰ Pichardo testified that it is very difficult to tell who was a practitioner or priest in the Santeria religion. He stated that "[Santeria] does not have this center where people can go and you can monitor and you have a number of set controls over that religious community." Pichardo went on to testify that the Church did establish its own internal identification techniques during the Mariel boatlift because there were a number of refugees that claimed to be priests of the faith:

[T]here were some loose ends out there that were in fact posing to be priests of the faith and were actually doing Santeria or what appeared to be Santeria ceremonies and ripping people literally off, and then they would take several thousand dollars from someone and take off, take off from Miami, and we had no religious

B. Animal Sacrifice

Animals, including chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles, are sacrificed as an integral part of the rituals and ceremonies conducted by practitioners of Santeria. According to Pichardo, most, but not all, of the animals are consumed as food after they are sacrificed.¹¹ A priest that performs sacrifice is taught as an apprentice through observation of sacrifices. Only priests trained in this manner are supposed to conduct animal sacrifice. Those priests are not involved in obtaining, maintaining, butchering, cooking or disposing of the sacrificial animals.¹² Pichardo, even as a high priest, is unaware of how those other functions were actually performed, although he did state that the animals were expected to be healthy, clean and free of disease. The priests receive no training in

or even legal means to be able to make use of or control those situations, so we did the best we could.

¹¹ Animals used in healing rites are almost never consumed.

¹² According to Pichardo, the preparation for the animal sacrifice requires that there be several priests, all with different functions. For example, there are those who clean-up after the sacrifice; a person who actually handles the animal--inspects the animal to see that it is healthy and clean and then brings that animal to the place where it is to be sacrificed; a priest and his apprentice who actually kill the animal; a person who removes the carcass; a butcher or butchers; a person who takes the butchered animal to be cooked; a cook or cooks. Each function is kept separate from the other and no one else really knows how each person performs his or her function.

establishing that an animal is disease-free, but rely on personal observation. Pichardo himself has never been involved in the disposal of animal carcass and has no knowledge of what is actually done with the remains of sacrificed animals, whether or not any part of the animal is consumed.¹³

There appears to be no prohibition in the Santeria religion against animal burial, animal incineration, or animal disposal in sanitary waste containers or animal disposal in any form. Pichardo testified that the Church would have no problem in complying with legal requirements in those areas; but there was no way in which other practitioners, outside the Church itself, could be monitored or controlled; and no legal requirements to which this Court could address itself.¹⁴

¹³ Pichardo speculated that the remains of sacrificed animals were probably placed in the garbage of the private homes. Pichardo further testified that he has no idea of the average number of animal sacrifice performed each week in the City of Hialeah by priests of the Yoba faith.

¹⁴ In the Yoba religion, divination is based on the *ifa* divination cycle. *Ifa* is made up of 256 *odus* or principles. Each *odu* is further subdivided in groups of 16. Divination through *ifa* is usually performed by the casting of shells or stones. The pattern is then read and interpreted as communication from the various deities.

Through divination, *ifa* mandates the type of animal to be sacrificed and the use to which the sacrifice should be put. It is the individual priests, however, who interpret, or misinterpret, the basic principles of *ifa*. Pichardo interprets [1472] the religious principles of Santeria as requiring that a practitioner obey the law; i.e., if the law says that dead animals cannot be disposed of in public roadways, a practitioner could not dispose of the carcass in such a way and still be in compliance

[1472] Pichardo testified that the actual killing of the animal is taught by oral apprenticeship. The apprentice, by observing an experienced priest, sees where and how the knife should be inserted. Ultimately, the apprentice priest becomes certain that he can adequately perform the sacrifice and do the actual killings assisted by the teacher.¹⁵ After the teacher is satisfied that the student has the ability to perform the sacrifice, the student is allowed to kill the animal without assistance. A student may be taught by more than one priest.

with religious principles. However, a priest could interpret *ifa* to require that an animal carcass be left in the open, or even neglect to consult the *ifa* at all regarding the disposal. Pichardo testified that he had a strong feeling that lesser nonhierarchy priests do misinterpret the divination process and could in fact order the disposal of animal remains in public places. Pichardo claims that such a priest would be a deviant, but admits that such a priest could interpret *ifa* in that way.

Pichardo speculated that his Church would be able to stop what he considered to be deviant practices, but gave no indication on how this would be accomplished, beyond just opposing such practices. Pichardo speculates that if the Church is allowed to practice its rituals openly, it will "absorb the thousands that are out there in South Florida and have them come in and not hide behind doors because of fear of persecution and discrimination and what have you." However, Pichardo admits that while he estimates 50,000-60,000 Santeria practitioners in South Florida, he has no idea how many are located in Hialeah, or how many would actually come forward and join the Church.

¹⁵ The teacher and the student both hold onto the knife and the teacher guides the student through the killing stroke a number of times.

According to Pichardo, an animal that is to be sacrificed is placed on a table on its left side. The apprentice holds the legs and the priest that will perform the sacrifice stands on the other side of the animal and holds the animal's head, with the head facing away from the priest.¹⁶ The animal's head extends beyond the edge of the table and is held high on the nose area by the priest's left hand. The knife is held in the priest's right hand (even if the priest happens to be left-handed).

Pichardo testified that the animal is killed within a matter of moments after being placed on the table. The priest punctures the neck of the animal with a knife¹⁷ right into the main arteries in one movement. The knife is inserted into the right-hand side of the animal's neck and is pushed all the way through the animal's neck. The knife does not actually cut the throat of the animal, but instead goes directly into the vein area, just behind the throat, and in front of the vertebrae. This hopefully would sever both of the main arteries of the animal.

¹⁶ The priest is standing in a position so that the back of the animal on the table is basically against the front of the priest.

¹⁷ The knife is usually approximately 4 inches long.

There was expert testimony¹⁸ that established that this method of killing is not humane because there is no guarantee that a person performing a sacrifice in the manner described can cut through both carotid arteries at the same time. Additionally, some of the lining of the artery can recoil and close the artery to prevent the instant hemorrhaging, in a tourniquet effect. Dr. Fox concluded, and this Court finds, that the method used by the priest is not a reliable or painless method of severing both carotid arteries.

Dr. Fox also testified, and this Court finds, that with young goats or sheep, there are deeper arteries within the vertebrae so that these animals would not likely be unconscious instantaneously. Only a complete neck severance can make it clear that the arteries have all been severed and a stabbing or poking is not accepted from either a traditional standpoint or a humane standpoint.

A chicken is even more problematic because of the fact that poultry have both internal and external carotid arteries. In other words, there are four carotid arteries that must be severed. Those arteries are rubbery and slide, and this increases the possibility of one of the arteries being missed.

¹⁸ The expert witness, Dr. Michael Fox, is the vice-president of the Humane Society of the United States and directs the Center for Respect for Life and Environment in Washington, D.C. Dr. Fox has a degree in veterinarian medicine from the Royal Veterinary College in London. He also has a Ph.D. in medicine from London University and a Doctor of Science in Animal Behavior Ethology. Dr. Fox has written approximately thirty books, including books on farm animals and caring for poultry, sheep and other livestock.

The animal being killed is likely to experience both pain and fear. First, the animals are often kept in close confinement and with animals other than its own species while awaiting sacrifice. This causes great stress and anxiety to the animal. Second, an animal led into a room where other animals had just been killed would perceive the body secretions of the animals that had been killed. Animals that experience fear often secrete chemical metabolites known as thermones, and the odor of these thermones can trigger an intense fear reaction in other animals that detect those odors.¹⁹

The stress and fear experienced by chickens is particularly dangerous because the chickens' immune systems become affected and this leads to the increased growth of bacteria, salmonella especially, in those chickens' systems. Salmonella is very harmful to humans and a visual inspection of a chicken would not reveal that it had this disease.

Although an expert pathologist, Dr. Wetli, testified for Plaintiffs that the death of the animal, as described, would be very rapid,²⁰ Dr. Wetli is not a veterinarian and has no knowledge of any biological differences that might impact on his evaluation. Dr. Wetli testified that even though the animal might experience pain, but that the animal's interpretation of the pain might not be the

¹⁹ Animals may not always appear to be experiencing fear because of a condition known as "tonic immobility" where an animal in intense fear simply freezes, or becomes immobile. Those animals, however, are experiencing both fear and pain. Dr. Fox testified, and this Court finds, that the chance of an animal under these circumstances not defecating or urinating could only occur if the animal was deprived of food and water for a period of time prior to the sacrifice.

²⁰ Dr. Wetli defined rapid as being "within less than a minute."

same as a human's. The Court finds that the testimony of Dr. Fox, with his specialized knowledge, is more credible in this area and, accepts Dr. Fox's conclusions that the method used in sacrificing the animals is not humane, but in fact causes great fear and pain to the animal.

According to Pichardo, after the animal is killed, the animal's blood is drained into clay pots placed underneath the animal's head. The animal is then decapitated and removed from the area. The pots of blood are placed before the deities until the animal's carcass is removed.²¹ Then, according to the way Pichardo was taught, the blood is also removed and disposed of; but how it is disposed of remains a mystery.

Pichardo testified that in the initiation rite, which lasts for eight days, the sacrifices all occur on the second day, one after another.²² The initiate and the priests are

²¹ The number of animals sacrificed and the number of pots of blood collected depend on the number of deities involved in that ceremony. There was some credible testimony that the blood is at times actually drunk, placed on individuals, or left in the pots for long periods, although Pichardo testified that he would find these to be deviant practices. One witness testified that his parents had practiced Santeria and, as a child, he had been offered blood to drink, but had refused.

²² Pichardo estimated up to 600 initiations per year are performed in private homes in Dade County. Pichardo admitted that the constant traffic in and out of the house during the eight day initiation rites could disturb the neighbors, as well as the butchering of the animals if the neighbors could observe it. Additionally, Pichardo testified that between 20 and 30 animals are usually sacrificed during an initiation rite. That means that between 12,000 and 18,000 animals are sacrificed in

in a "sacred" room. Only those with a specific function are allowed in the sacred room. The initiate is confined to one corner of the room and must stay in that corner of the room for the entire eight days.²³ The usual age of an initiate is [1474] 30-35 years old, but children as young as seven years have been initiated.²⁴

The sacrificial animals are brought into the room and led over to the initiate for the initiate to touch. In an initiation ceremony there are between 6 and 13 deities and anywhere from 24 to 56 four-legged animals and fowl are sacrificed.²⁵

The animals are butchered, cooked and eaten during the eight day initiation period. The butchering is usually done outside. This Court finds it incredible that so many animals can be properly butchered and cooked in one home in a matter of hours; it is much more likely that this process takes most, if not all, of the remaining seven days.

In the faith healing rites, usually only one animal is sacrificed. The illness is considered to have then passed to the animal. The animal is not eaten, but is either placed on the altar of the deity for several hours, or is

initiation rites alone, during a one year period.

²³ The initiate can leave the room, under guard, only to use the bathroom facilities.

²⁴ Young children are usually only initiated if it is considered a crisis situation, i.e., if the child has some type of illness. Pichardo himself was initiated at age 16. Additionally, children of all ages are permitted to witness the public sacrifices during the annual ceremonies, as long as the parents are present.

²⁵ A usual initiation would involve the sacrifice of six four-legged animals and twenty-four chickens.

disposed of entirely.²⁶ There was no testimony as to how the animal carcass is ultimately disposed of.²⁷

A priest can obtain animals from many different sources. Usually a priest works mostly with one botanica.²⁸ Pichardo testified that he assumes that the animals are usually purchased from licensed vendors that purchase only animals that have been properly inspected; however, he was never involved in this part of the ritual and the testimony revealed that this is not usually the case. Most animals are bought either from botanicas or from local farms that breed the animals specifically for sacrifice. Most of the time, botanicas are not licensed to sell or house animals on their premises but will buy the animals from the local farms or transport the animals into the state illegally. The animals are often kept in overcrowded and filthy conditions on the farms. Additionally, when the botanicas buy the animals, they are transported and then kept in the botanicas' back rooms, again often in extremely overcrowded conditions. The animals are not always fed and watered, but instead are kept for only a few days

²⁶ In the death rites, there are usually one four-legged animal and two fowl sacrificed.

²⁷ Those animals are not consumed either. No witness could recall ever seeing how a carcass was disposed of, even Pichardo, who had himself performed animal sacrifice. The only testimony regarding the disposal of animal carcasses was the testimony relating to the carcasses found in public places, which some witnesses testified to as being consistent with the practice of Santeria.

²⁸ A botanica is a store that specializes in selling religious articles--usually those articles associated with or used in Santeria and in animals for sacrifice.

then sold for immediate sacrifice. These conditions can cause intense suffering by the animal.

There was significant testimony about the remains of animals, along with religious paraphernalia, being found in public places.²⁹ Pichardo admitted that these things happen, but state that some of them are probably the result of other religions that practice animal sacrifice. Pichardo did admit, however, that some of the carcasses were probably the result of Santeria practitioners who were deviating from the correct principles, at least as Pichardo interpreted them.³⁰

There have been no instances documented of any infectious disease originating from the remains of animals being left in public places. Animal remains are, however, a health hazard because the remains attract flies, rats and other animals. Both vectors³¹ and reservoirs³² are created [1475] around such animal remains because the rats, flies and other animals that are attracted may themselves carry and exchange diseases and thus the risk of the spread of disease to humans is increased. Flies alone have been known to transmit up to 65 different kinds of human and animal

²⁹ Animal carcasses are most often found near rivers or canals, by four-way stop signs, under certain palms, and sometimes in people's lawns or on doorsteps.

³⁰ See footnote 14.

³¹ A vector is a means by which a pathogenic organism is transmitted or transferred from one agent to another agent.

³² A reservoir is an area--either another animal, an animate object or an inanimate object--where the organism can lodge and multiply.

diseases.³³ Areas where dead animals are left can become a harborage for rats and fleas where the spread of disease to other animals and to humans is much more likely.³⁴

There was also much testimony regarding the effect on children exposed to animal sacrifices. Dr. Raul Huesmann, a research psychologist, has done extensive research on the development of aggressive³⁵ and violent behavior in child and adults. He specializes in the study of the effects of the observation of violence on the development of such behavior. Dr. Huesmann testified that the observation of animal sacrifice, particularly in the circumstances of the initiation rite where a number of animals are sacrificed would detrimentally affect the mental health of the child and the behavior in such a way that it would be detrimental to the community in which the child resides. Specifically, the observation would be likely to produce psychological processes that promote greater tolerance of aggressive and violent behavior and might even increase the possibility of aggressive and violent behavior by the child himself.

There are three psychological processes that are involved: 1) desensitization; 2) tolerance; and 3) imitation. Desensitization occurs when the child is exposed to repeated scenes of violence. The child stops

³³ For example, the more common diseases carried by flies include dysentery, typhoid, cholera, salmonella, salmonosis, infectious hepatitis, yaws, trachoma and many of the parasitic worms. Rats are commonly associated with plague, *Leptus pyrosis*, and marine typhus.

³⁴ Dr. Wetli, the pathologist that testified for Plaintiffs, agreed with this conclusion.

³⁵ The term "aggression" is used to denote intentional violence, as opposed to the term as it is sometimes used to denote assertive behavior.

reacting emotionally to those acts and the acts become more palatable to the child. Tolerance results from this process of desensitization. Imitation is the final stage. A child is more likely to imitate and be influenced by actors that are perceived as being of high status. In other words, if the child perceives the person engaging in the violent act as a high status person, the effects seem to be exacerbated. This effect would be strongest with multiple acts that are spaced out in time. Dr. Huesmann concluded that a child's observation of animal sacrifice would be likely to increase the probability that the child will behave aggressively and violently, not just against animals but against humans.

The observation of violence is only one factor in the development of aggressive and violent behavior. An individual can have violent and aggressive behavior which is totally unrelated to the observation of violence.³⁶ Dr. Huesmann did not testify that observation of violence would lead inalterably to violent behavior; just that such observation was more likely to promote such behavior. Whether the aggressive behavior will become serious enough to be a problem would depend on the convergence of a number of other factors.

What Dr. Huesmann did testify to, and what this Court accepts, is that there is a correlation between the observation of violence by children, especially when conducted by persons of perceived high status, and the likelihood of the development of violent and aggressive behavior.³⁷ The younger the child, the stronger the

³⁶ For example, some persons have various kinds of tumors and abnormalities in certain areas of their brain and, as a consequence, behave very violently.

³⁷ Dr. Huesmann stated that "you would have people who would be more likely to engage in violent acts as adults of a comparable population not exposed to the same scenes."

effect. The Court is convinced that the observation of animal sacrifice can have a detrimental effect on a child's mental health and on that child's future behavior.

[1476] Dr. Angel Velez-Diaz, a clinical psychologist, disagreed with Dr. Huesmann's conclusions, based on his observations of the clients that he had treated. Dr. Velez-Diaz agreed that observation of violence leads to a desensitization towards violence, but did not believe that this have a negative effect. Dr. Velez-Diaz admitted that the presence of desensitization may help in the production of violent behavior but stated that many other intervening factors would have to occur for such behavior to manifest. Dr. Velez-Diaz felt that because children witnessing animal sacrifices have been prepared for that event, no negative effects would occur. It would become a normal thing, although at first it would create some fear in the child.

Dr. Velez-Diaz has never conducted any studies in the area of the observation of violence by children, but agrees that the majority of studies do find a correlation between such observation and the possibility of an increase in violent behavior. Dr. Velez-Diaz did not think that such studies were valid when applied to children observing ritualistic animal sacrifice, but did not support his conclusion factually. This Court, in exercising its function as trier of fact, finds the testimony of Dr. Huesmann more credible.

A third expert, Ms. Hendrix, an educator at Miami Dade Community College, testified that she had done a study on children's attitudes towards death and had found that children exposed to death, both animal and human, saw death as a much more natural process. Ms. Hendrix concluded that a child that had been prepared to view animal sacrifice would view that sacrifice like any normal religious experience. Ms. Hendrix does not view animal sacrifice as a violent act.

This Court did not find Ms. Hendrix's views persuasive. First, she is completely unfamiliar with the studies done by Dr. Huesmann. Second, her own research had to do with attitudes towards death, not violence. Third, she claimed no personal knowledge regarding how animals were sacrificed, nor did she claim to have any contact with children who had observed such sacrifices.

C. The Ordinances

The Church occupied land situated at 173 West 5th Street, in Hialeah, Florida, in June of 1987, and began to seek the appropriate licenses to allow it to function as an established Santeria church. The goal was to establish a church, a school, a cultural center and a museum, and to bring Santeria into the open as an established and accepted religion. The Church fully intended to perform all of the religious rituals of Santeria, including animal sacrifice. The Church is currently located at 700 Palm Avenue, Hialeah, Florida, a commercial area.

Just after the Church began to organize and to prepare the land at 173 West 5th Street for occupancy, the Hialeah City Council enacted several ordinances regulating the killing of animals: No. 87-40 (an emergency ordinance adopting the language of the state's anti-cruelty statute, passed June 9, 1987); No. 87-52 (prohibiting the possession of animals intended for sacrifice or slaughter except where zoned, passed September 8, 1987); No. 87-71 (authorizing registered groups to investigate animal cruelty complaints, passed September 22, 1987); and No. 87-72 (prohibiting the slaughtering of any animals on premises not properly zoned for that purpose, passed September 22, 1987).

The City passed the ordinances pursuant to § 828.27, which authorizes municipalities to enact ordinances which are not in conflict with Chapter 828. The ordinances do not conflict with Chapter 828, Florida

Statutes but clarify that religious sacrifice of animals is not included in the exemption provided for ritual slaughter in kosher slaughterhouses, and that animal sacrifices violate the anti-cruelty statute of the State of Florida, and the various zoning regulations of the City of Hialeah.

Although the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah, the ordinances were not passed to interfere with religious beliefs, but rather to regulate conduct. The ordinances have three compelling secular purposes: 1) to prevent cruelty to animals; 2) to safeguard the health, welfare and safety of the community; and 3) to prevent the adverse psychological effect on children exposed to such sacrifices.

Plaintiffs have not been prosecuted by Defendant for any violations or intended violations of these ordinances. Additionally, no groups have been registered or authorized under 87-71 to investigate animal cruelty complaints. Plaintiffs have not sought to amend the City's laws regulating slaughterhouses, but, on July 12, 1989, for the first time sought zoning authorization to operate their current property as a slaughterhouse. At this time, there are no licensed slaughterhouses in the City of Hialeah, and zoning would not permit a slaughterhouse. Plaintiffs have not tried to challenge this zoning.

D. Discriminatory Treatment

The Church first took possession and began the cleanup of the property located at 173 W. 5th Street, in Hialeah, Florida, on April 1, 1987. The premises

required significant work before the Church could move in and actually occupy the buildings.³⁸

In early April, 1987, Fernando Pichardo, the administrative director and corporate secretary of the Church, contacted the water and sewer department, Florida Power & Light, and Southern Bell. Fernando Pichardo put a \$100 commercial deposit on the water and sewage service and a \$200 deposit on the FP & L service. Several problems then arose. First, the waste service was not provided; although the service was billed to the Church. Second, FP & L shut off the existing power at the Church and refused to reconnect the power until the City gave it final approval and issued a Certificate of Occupancy to the Church.

In registering the Church with the City to obtain the necessary occupational license, Fernando Pichardo ran into several delays. The City required that he provide an original certificate of incorporation from the State of Florida for the Church,³⁹ and proof of the Church's tax free status.⁴⁰ The City also needed to check the zoning of the property to make sure that it was zoned for churches.⁴¹ In all, it took three days to get the necessary information and documents together and register the Church. While Fernando Pichardo might have felt that

³⁸ Before the Church took possession, the premises had been a used car lot and was in bad repair. There was oil on the ground and car parts lying around; windows were broken; the grass was high; and the buildings needed repair work before they could be occupied.

³⁹ The Certificate of Incorporation needed to have the Church's non-profit status marked on it.

⁴⁰ It later developed that documentation of sales tax exemption was not necessary.

⁴¹ The area was zoned for churches.

this was unusual, the Court does not find it unusual at all that it took three days to process the application through the City. There was certainly no evidence that any delay resulted from any discriminatory intent, and the testimony did not reveal that the Church was treated any differently than any other applicant.

The application for licensing and zoning approval was originally filled out on May 27, 1987,⁴² and completed on May 29, 1987.⁴³ On May 29, 1987, a Friday, the documentation was turned over to the inspector's department so that the inspectors could come out and do the inspections. On the next Monday, June 1, 1987, several inspectors turned up to do the various necessary inspections. It is the usual practice of that department to inspect premises on [1478] the next working day after receiving the application.

There were three inspections that the Church premises did not pass on June 1, 1987: the fire inspection, the electrical inspection and the plumbing inspection. The failures were not the result of discriminatory action on the part of the inspectors or any City official. The Church passed the fire inspection two days later.

⁴² The application was originally filled out and filed by Ernesto Pichardo after an official of the City came to the premises to tell him that the Church was operating in violation of the licensing requirements. That official drove Pichardo to City Hall to begin the paperwork.

⁴³ That application did not mention that the Church wished to perform animal slaughter. On July 10, 1989, just two weeks before this trial began, the Church for the first time applied for an occupational license to perform animal slaughter for consumption on its premises. That application has been held in abeyance pending the outcome of this litigation.

The Church failed the electrical inspection because of faulty wiring in an air conditioner and a faulty disconnect switch on the outside of the building. The electrical inspector also found an electrical meter that was not designed for that use. The inspector notified FP & L and requested that the power be disconnected from that unsafe meter. A permit was taken out by a licensed electrical contractor on July 7, 1987, and the electrical problems were corrected and completed on July 13, 1987.

The Church failed the plumbing inspection because the South Florida Code requires that for this type of use, separate bathrooms must be installed for men and women. There was only one bathroom on the premises and another bathroom had to be added. A building permit for the additional bathroom was obtained on July 29, 1987 and a plumbing permit was filed for on August 3, 1987. A plumbing inspection was done on August 4, 1987, and the final inspection was called for and issued on August 6, 1987. A certificate of occupancy was issued by the City on August 7, 1987, one day after the final inspection.

Florida Power & Light is prohibited from supplying service to a commercial property that has not been approved for an occupational license nor received an approval on the electrical inspection. The Church's power was disconnected, after a five-day notice to the Church, because it was discovered that it had been turned on without authorization and with the use of the improper meter.⁴⁴ As soon as the proper license and approvals were received, the power was turned on. FP & L did not treat this account differently than any other commercial account, except that in disconnecting the service, James Kirk first called FP & L's legal depart-

⁴⁴ This led FP & L to conclude that the power had been turned on by other than FP & L.

ment. He testified that he did this because of the fact that it was a church involved.

The solid waste department failed to pick up the garbage, even though the Church had placed its deposit and was being billed. The water department collects the deposit and does the billing and the waste department has no control over those functions. On the day that the waste department was notified that the Church was not receiving its services, a supervisor went to the premises and obtained a letter of intent to start service on that same day. The waste department then corrected the problem, started service on that same day, and credited the Church's account with the amount that the Church had been billed.

There was testimony to the effect that the council meetings that took place concerning the Church were done in a mob atmosphere and that the council members intended to discriminate against the Church and to stop the Church. There was absolutely no evidence that any council member, at any time, attempted to influence the various licensing, zoning and building departments of the City, or the waste department, FP & L or Southern Bell. The various delays and problems that the Church encountered with its physical plant were either the result of the premises' failure to meet the necessary building requirements, or because of bureaucratic paperwork, and not because of any discriminatory intent on the part of any individual, agency or company.

Plaintiffs complained of two instances of alleged increased law enforcement scrutiny. First, a "police perimeter" was established around the Church premises when the first outdoor mass was held. Second, a police vehicle stopped Fernando Pichardo one night as he was leaving the premises with some trash and asked him what he was doing. When he replied that just leaving the premises, no further conversation was had. This Court does not hold that either of these instances were the result of [1479] a discriminatory intent by the City,

but, instead, were just instances of the police carrying out their duties. The "police perimeter" was, in fact, a protection for the Church due to the intense and often hostile media coverage.

The Church also alleges that the ordinances were passed because of the council members' intent to discriminate against the Church and to keep the Church from establishing a physical presence in the City. There was no evidence to support this contention. All the evidence established was that the council members' intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals, including animal sacrifice, the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by.

CONCLUSIONS OF LAW

A. Standing

Plaintiffs seek to have the ordinances promulgated by the City of Hialeah declared unconstitutional, both in their totality and as applied to Plaintiffs. The Declaratory Judgment Act, 28 U.S.C. § 2201, requires that before a court can issue declaratory relief, an "actual controversy" must exist. *Emory v. Peeler*, 756 F.2d 1547 (11th Cir. 1985). "[T]he continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury." *Id.* at 1551-52. Further, "federal courts should not consider the abstract constitutionality of municipal policies." *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1554 (11th Cir. 1989).

Standing to sue requires that a plaintiff has suffered a distinct and palpable injury that is likely to be redressed if the requested relief is granted. *Simon v.*

Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). Redressability is an essential component of the standing requirement and Plaintiffs must fail the test if removal of one purported barrier to their conduct would not secure any meaningful relief because other barriers remained. *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 261-65 (D.C. Cir. 1980); *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 777 F.2d 598, 606 (11th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

If this Court were to find that the ordinances were invalid, Plaintiffs would still be prohibited from performing ritual sacrifices under § 828.12 of the Florida Statutes. See Opinion Attorney General 87-56 (1987). Additionally, there are several provisions of the Hialeah City Code that would apply, including zoning provisions, health and sanitation provisions and licensing provisions.

This Court also remains troubled by the ripeness issue. In the instant case, Plaintiffs have not attempted to show repeated prosecutions, or pointed to any enforcement under the ordinances. Additionally, at no point have Plaintiffs raised any free exercise challenge addressed toward the validity of slaughterhouse zoning regulations that Plaintiffs might encounter. Instead, Plaintiffs assert that the city council passed the ordinances in an attempt to target the Church in particular and the practitioners of Santeria generally. Specifically, Plaintiffs allege that the passage of the ordinances was intended to force the Church out of Hialeah, and to chill the religious freedom of Santeria practitioners by imposing criminal sanctions on practices that are an integral part of that religion. This Court therefore restricts itself to the consideration of those issues, and will not resolve the abstract questions of whether all laws restricting animal sacrifice for religious purposes are unconstitutional, or whether Plaintiffs could practice

animal sacrifice if they were in an area zoned for slaughterhouses.

B. State Statutory Preemption

The first argument presented by Plaintiffs is that the City's ordinances are invalid because the ordinances are in conflict [1480] with Chapter 828, Florida Statutes. Specifically, Plaintiffs argue that the ordinances conflict with Florida law because: 1) § 828.22(3) protects the ritual slaughter of animals; and 2) the ordinances provide for a criminal penalty and authorize private parties to assist in the prosecution of violations of the ordinance and thus violate the restrictions on ordinances set forth in F.S. § 828.27.

An ordinance need not be identical with a Florida statute in order to be valid. Validity is presumed and the party challenging a municipal ordinance bears the burden of proving that ordinance is invalid. *Wallace v. Town of Palm Beach*, 624 F.Supp. 864, 869 (S.D. Fla. 1985); *Bennett M. Lifter, Inc. v. Metropolitan Dade County*, 482 So.2d 479, 481 (Fla. Dist. Ct. App. 1986); *City of Miami v. Kayfetz*, 92 So.2d 798, 801 (Fla. 1957). An ordinance is preempted by state law only where the municipal ordinance directly conflicts with the state statute. *Boven v. City of St. Petersburg*, 73 So.2d 232, 234 (Fla. 1954). Thus, the ordinances in the case *sub judice* are only invalid if they conflict with F.S. § 828.27(4).

Florida Statute § 828.27(4) permits a municipality to adopt an ordinance identical to Chapter 828, but forbids a "municipal ordinance relating to animal control or cruelty [from] conflict[ing] with the provisions of" Chapter 828. A municipality need not adopt the exact wording of Chapter 828. Additionally, a municipality may go beyond the state statute so long as it does not conflict with the statute. *Lamar-Orlando Outdoor Advertising v. City of Ormand Beach*, 415 So.2d 1312, 1321 (Fla. Dist. Ct. App. 1982); *City of Miami Beach v.*

Rocio Corp., 404 So.2d 1066, 1070 (Fla. Dist. Ct. App. 1981). Municipalities often exercise this privilege by providing for greater enforcement measures or stricter controls.

Plaintiffs first claim is that the ordinances conflict generally with the state slaughter laws, F.S. §§ 828.22-828.26, and, specifically, with the ritual slaughter exemption contained in F.S. § 828.22(3). Sections 828.22-828.26, Florida Statutes, relate to the use of humane methods in the slaughter of livestock for food. See Opinion Attorney General 87-56 (1987). The statute was enacted to conform Florida law to the provisions of the Federal Humane Slaughter Act of 1958, and is nearly identical to that Act. 7 U.S.C. §§ 1901-1906.

The exemption for "ritual slaughter" contained in § 828.22(3) applies only to religious slaughtering of animals for food. Opinion Attorney General 87-56 (1987).⁴⁵ For example, an exception has been recognized to apply to the production of Kosher meat where animals are slaughtered according to the Jewish ritual slaughtering method known as *shehitah*. *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974). The Hialeah ordinances, on the other hand, only prohibit sacrificing animals where the primary purpose is not food consumption. Accordingly, there is no conflict between the ordinances and § 828.22(3).

Animal sacrifice also violates Florida Statutes § 828.12, which makes it a criminal violation for one to "unnecessarily" or "cruelly" kill an animal. See *Wilkerson v. State*, 401 So.2d 1110, 1112 (Fla. 1981). The Attorney General's opinion notes that the ritual killing of an animal does not constitute a "necessary" killing so as to

⁴⁵ "[O]pinions of the attorney general are persuasive and entitled to great weight in construing Florida Statutes." *State v. Office of Comptroller*, 416 So.2d 820, 822 (Fla. Dist. Ct. App. 1982).

make the prohibition in § 828.12 against unnecessarily or cruelly killing an animal inapplicable. Hialeah ordinance 87-52 defines "sacrifice" as to "unnecessarily kill, torment, torture or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." Thus, the Hialeah ordinance and the Florida Statutes are consistent in their treatment of animal sacrifice.

Plaintiffs next argue that, by exempting ritual slaughter from the provisions of the Act, the legislature intended to preempt municipalities from legislating any regulations whatsoever on ritual slaughter, and thus, Ordinances 87-52 and 87-72 impermissibly regulate slaughter.

[1481] Neither ordinance conflicts with the exemption afforded to ritual slaughter. Ordinance 87-52 states that "[n]o person shall ... slaughter ... any ... animal, intending to use such animal for food purposes." Ordinance 87-52 also states that "nothing in this ordinance is to be interpreted as prohibiting any licensed establishment for slaughtering for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture." Therefore, ordinance 87-52 only bans slaughter if done outside the regulatory requirements of both local and state laws.

The State of Florida left the siting and inspection of slaughterhouses to localities. See Fla. Stat. § 585.34(3) ("Municipal corporations may establish and maintain the inspections of slaughterhouses"). Land-use control is a local prerogative that is exercised through the use of zoning ordinances. See Fla. Stat. §§ 163.3161-163.3213; *Hillsborough Ass'n for Retarded Citizens, Inc., v. City of Temple Terrace*, 332 So.2d 610, 612-13 (Fla. 1976). Zoning laws and regulations that are enacted by municipalities in the exercise of the municipalities' police power are proper. *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521, 1525 (11th Cir.1988) ("Municipalities may

zone land to pursue any number of legitimate objectives related to the health, safety, morals or general welfare of the community."). Accordingly, the City of Hialeah acted properly in enacting zoning regulations that clarified that ritual sacrifice was not a protected practice under the ritual slaughter exception to the Humane Slaughter Act, and that all slaughters could only be performed in areas zoned for that use.⁴⁶

Plaintiffs next challenge the validity of the ordinances on the ground that the Hialeah ordinances provide for a criminal penalty, while § 828.27(2) only permits a civil penalty. Thus, Plaintiffs argue that the ordinances are in conflict with the state statute and must be struck down.

Section 828.27(2) controls penalties in "ordinances relating to animal control or cruelty." Ordinance 87-72 is an ordinance "Prohibiting The Slaughtering Of Animals Upon Any Premises in the City of Hialeah, Florida, Except Those Premises Properly Zoned As A Slaughter House." Ordinance 87-72 provides, in part, that "[i]t shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

⁴⁶ The City of Hialeah presently has no areas that are zoned for slaughterhouses. As mentioned before in footnote 41, the Church on July 10, 1989, just before the trial of this matter, applied for an occupations license to perform animal slaughter for consumption on Church premises. Therefore, the issue of whether the Church could receive a zoning variance to perform animal sacrifice, where the animal is to be consumed, has never been directly addressed, and is not before the Court at this time.

Ordinance 87-52, and the ordinance amended by it, Ordinance 87-40, also relate to zoning, and provide that:

Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

Therefore, all three of these ordinances are zoning regulations that explicitly prohibit certain acts except where properly zoned. The penalty requirements of the ordinances, therefore, do not conflict with any penalty requirement if Chapter 828, which is limited only to "ordinance related to animal control or cruelty." While one of the secular purposes of ordinances 87-40, 87-52, and 87-72 is to prevent cruelty to animals, those ordinances are first and foremost zoning ordinances, and are not in and of themselves, "ordinances related to animal control or cruelty."

The City of Hialeah clearly has the authority to prescribe penalties for zoning [1482] violations different from those relating to animal control or cruelty. Because the ordinances do not solely relate to animal control or cruelty, the statute establishing the maximum penalty for violation of such an ordinance is inapplicable.

Additionally, even if § 828.27 did apply to the ordinances, that provision specifically authorizes municipalities to enact an ordinance identical to the state law "except as to penalty." While § 828.27 focuses on ordinances with a civil penalty, another section of that Chapter, § 828.12, directly provides a criminal punishment, as a first degree misdemeanor, for unnecessarily

or cruelly beating, mutilating or killing an animal.⁴⁷ The City's criminal penalties are therefore fully consistent with the state statutes prescribed penalty for the same misconduct.

Plaintiffs last challenge to the validity of the ordinances concerns the provisions in ordinances 87-71 and 87-72 which provide that agents of private organizations may "assist[] in the prosecution of any violation[s]." Plaintiffs argue that this provision conflicts with the state law.

Ordinances 87-71 and 87-72 do not provide for prosecution by agents, only that such agents may assist in the prosecution.⁴⁸ This suggests that such agents could assist in testifying, providing evidence, and generally aiding the municipality in pursuing a prosecution. Further, the state statute itself has a provision that provides for appointed agents to investigate violators. See § 828.03. This provision was amended to "provide for investigation rather than prosecution of offenders by agents of described societies." Fla. Stat. Ann., Chapter 828, at 431. The Hialeah ordinances certainly do not provide for the agents to prosecute violators, but only to assist in the prosecution. This is certainly within the purview of Chapter 828 and is therefore not in conflict with that statute.

The ordinances at issuance here clearly do not conflict with Florida state law and, therefore, are not preempted. Accordingly, this Court must now address directly the constitutional issue raised by Plaintiffs.

⁴⁷ Section 828.12 was recently amended to include a provision making intentional torture of animals punishable as a felony. See Ch. 89-194.

⁴⁸ To date, the City of Hialeah has never appointed any agents under this provision.

C. First Amendment Challenge

This Court feels that there is a need to put this case in the proper perspective. Plaintiffs essentially represent immigrants who have brought to these shores not only the traditions and customs normally attributable to a migrating people, but also the religion of Santeria, a religion which has only recently begun to be practiced in this country. Without question, it extends back to Africa, where it was an openly acceptable form of religion some 400 years ago. After having travelled for four centuries and thousands of miles, it came to Miami and has an estimated 50,000 to 60,000 religious followers in this community.

Migration has been the lifeblood of this country. As each of the tens of thousands came, they brought with them their unique heritages which were ultimately integrated and woven into the fabric which is America. The strength of that fabric has grown over two centuries.

Those who fled poverty found opportunity; those who were deprived of the opportunity of expression found freedom of speech; and those who were deprived of the opportunity to worship God found freedom of religion. These newfound freedoms, however, were not unabridged and absolute. The First Amendment to the United States Constitution reads today as it did when it was ratified on December 15, 1791:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

With the adoption of the Fourteenth Amendment on July 9, 1868, it specifically made the First Amendment applicable to [1483] state action when it provided that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States." If one were to adopt as a constitutional philosophy the writings of John Stuart Mill or John Locke, the privileges afforded under the First Amendment through the Fourteenth Amendment, the freedoms of speech and religion, would be incapable of restriction in any form. As it pertains to particularly freedom of speech, certainly Mr. Justice Black and Mr. Justice Douglas would have seen fit to do so. See e.g., Black, the Bill of Rights, 35 NYU L. Rev. 865 (1960); *Roth v. United States*, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, L.Ed.2d 1498 (1957) (Douglas, J., dissenting). Neither Justices Black nor Douglas, however, expressed the constitutional philosophy of the courts in giving meaning to the First Amendment to the United States Constitution.

No one for a moment would espouse the view that freedom of speech would allow an individual to shout "Fire" in a crowded theater. Although all ideas having even the slightest redeeming social importance have the full protection of the Constitution, implicit in the history of the First Amendment is the rejection of obscenity as being utterly without redeeming social importance. *Alberts v. California*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308-09, 1 L.Ed.2d 1498 (1957).

Freedom of religion, like freedom of speech, is subject to a similar analysis when we are dealing, as here, with the manner in which the religion is conducted rather than the beliefs of those seeking to exercise it. It is the former and not the latter which is the subject matter of this Court's opinion.

Plaintiffs claim that the City's ordinances unconstitutionally impinge upon their free exercise of religion. The Eleventh Circuit has set forth a framework to be used when a court is addressing this issue. *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52

(1984).⁴⁹ Before the Court balances competing governmental and religious interests, the government's action faces two threshold tests: the law must regulate conduct rather than belief, and it must have both a secular purpose and effect. *Id.* at 733. The government in the case at hand has met both tests.

First, the ordinances clearly are directed at conduct and not belief. The conduct sought to be prescribed is the performance of animal sacrifice. The ordinances do not attempt to regulate belief and thus the law clearly meets the first threshold test.

The second threshold test is whether the ordinances have a secular purpose and effect. *Id.* at 733. Defendant acknowledges that the challenged ordinances arose in response to the opening of Plaintiff Church in the City; however, that does not necessarily indicate that the purpose of the ordinances was to exclude the Church from the City. Instead, the evidence showed that the Defendant responded to Plaintiffs' announced intention that Plaintiffs planned to conduct animal sacrifices.

Defendant was aware that animal sacrifices were being conducted in private homes. That practice was becoming an increasing problem and the Church's announcement triggered this legislative action, which was not aimed solely at Plaintiffs, but was an attempt to address the issue of animal sacrifice as a whole.

The ordinances do not on their face violate the secular purpose test. Ordinance 87-40 adopts the State's animal cruelty laws and does not mention religious

⁴⁹ The district court in *United States v. Billie*, 667 F.Supp. 1485, 1494-97 (S.D. Fla. 1987), relied on the analytical steps set forth in *Grosz* to evaluate a Seminole Indian's free exercise challenge to a conviction for taking a Florida panther in violation of the Endangered Species Act.

conduct at all. Ordinance 87-72 prohibits anyone from slaughtering animals anywhere in the City except in properly zoned slaughterhouses. Ordinance 87-52, adopted from the model statute provided by the Humane Society of the United States to the City Attorney's office, provides that "[n]o person shall ... possess, sacrifice, or slaughter any ... animal for food purposes." This section applies to "any group or individual that kills, slaughters or sacrifices animals for any type of ritual." Ordinance 87-52 therefore acts as a blanket and facially neutral prohibition on the killing of animals by anyone for any reason, except in slaughterhouses. This ordinance was not meant to single out persons engaged in ritual sacrifice, but to put those persons on notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter, done in slaughterhouses.

Ordinance 87-71 amends 87-52 to include prosecutorial assistance by registered agents and reiterates the absolute prohibition of sacrifice.⁵⁰ The use of the phrase "ritual or ceremony," in ordinances 87-52 and 87-71, does not impermissibly target religious conduct. A federal court, in discussing the meaning of the ritual slaughter exception in the Federal Humane Slaughter Act, recognized that "ritual" is not synonymous with "religious." *Jones v. Butz*, 374 F.Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd*, 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974).⁵¹

"Ritual" or "ceremony," therefore, reaches not just demonstrably bona fide religious conduct, but also

⁵⁰ Sacrifice is defined as the unnecessary killing of an animal "in a public or private ritual or ceremony not for the primary purpose of food consumption."

⁵¹ Lower courts are bound by the summary decisions of the Supreme Court, unless reversed by that Court. *Hicks v. Miranda*, 422 U.S. 332, 334-45, 95 S.Ct. 2281, 2284-85, 45 L.Ed.2d 223 (1975).

includes the killing of animals by groups that would probably not enjoy First Amendment protection, such as satanic cults. Further, even if the use of the words "ritual" and "ceremony" are understood as targeting primarily religious conduct, nothing in the First Amendment prevents a municipality from specifically regulating such conduct when it is deemed inconsistent with public health and welfare.⁵²

Strict religious neutrality is not required by the First Amendment. See *Wallace v. Jaffree*, 472 U.S. 38, 82-83, 105 S.Ct. 2479, 2503, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring); *McDaniel v. Paty*, 435 U.S. 618, 639, 98 S.Ct. 1322, 1334-35, 55 L.Ed.2d 593 (1978) (Brennan, J., concurring) (noting that "government [may] take religion into account when necessary to further secular purposes"). Courts have repeatedly upheld laws explicitly mentioning religious conduct so long as they serve a secular purpose. See e.g., *Jones v. Butz*, 374 F.Supp. at 1292-93 (noting that explicit religious exemptions in laws are permissible, citing Sunday closing and conscientious objector decisions). Thus, in this case, the ordinances have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect.

After the two threshold tests are passed, the court is faced with the difficult task of balancing governmental and religious interests. This "balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity." *Grosz*, 721 F.2d at 734. However, before engaging in that balancing process, the Plaintiffs must identify the costs on their religious activities imposed by

⁵² Whether the conduct is in fact incompatible with public health and welfare is left to the balancing phase of the free exercise inquiry.

the government, and these costs must be the consequence of legally cognizable infringements on religious freedom.⁵³

[1485] Plaintiffs have shown that the practice of animal sacrifice is a integral part of their religion. Further, the evidence has established that not all of the animals sacrificed are consumed.⁵⁴ The fact that Plaintiffs have never directly attacked the zoning requirements for slaughterhouses does not dispose of the larger issue of the killing of animals not for food purposes.⁵⁵ Thus,

⁵³ Plaintiffs cannot maintain a facial challenge to the ordinances. A statute is overbroad on its face only if it is unconstitutional "in every conceivable application" or seeks to prohibit a broad range of protected conduct. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984); see also *New York v. Ferber*, 458 U.S. 747, 767-74, 102 S.Ct. 3348, 3359-64, 73 L.Ed.2d 1113 (1982); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985). Plaintiffs do not argue that the ordinances would be unconstitutionally applied to the killing of animals for nonreligious purposes, or to inhumane killing. "The possibility that [an ordinance] might be unconstitutionally applied to certain religious practices does not render it void on its face where the remainder of the [ordinance] covers a whole range of easily identifiable and constitutionally proscribable conduct." *Billie*, 667 F.Supp. at 1495. Because these ordinances can constitutionally apply to a wide range of conduct other than Plaintiffs', the ordinances are not void on their face.

⁵⁴ For example, the animals sacrificed in healing rites and in death rites are never consumed.

⁵⁵ Plaintiffs also contend that because the Plaintiff Church is not a "commercial" enterprise, the Church could not qualify under a slaughterhouse zoning variance even if such a variance could be obtained.

this Court has no doubt that the ordinances do burden Plaintiffs' religious practices.

The ordinances at issue were passed by the City because of the perceived need to prevent cruelty to animals, to safeguard the health, welfare and safety of the community, and to prevent possible adverse psychological effects on children exposed to such sacrifices.

1) Health Hazard

Courts have routinely upheld bans on religious conduct when such conduct posed a clear danger to the health of the public. For example, courts have, without exception, upheld ordinances and injunctions prohibiting ritual snake handling even when such snake handling was central to the religious practice. See e.g., *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 109 & n. 15 (Tenn. 1975), *cert. denied*, 424 U.S. 954, 96 S.Ct. 1429, 47 L.Ed.2d 360 (1976). Similar reasoning has been used by courts in upholding ordinances banning the use of marijuana despite its centrality to certain religious practice. See e.g., *United States v. Middleton*, 690 F.2d

820, 824-26 (11th Cir.1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983).⁵⁶

The compelling interests in public health and welfare that motivated the passage of legislation banning snake handling and marijuana use and persuaded the courts to uphold those laws are precisely the government interests at issue here. The evidence at trial revealed a risk of physical harm to members of both Plaintiff Church and the public from disease and infestation. It is beyond dispute that the government has a compelling interest in controlling disease. See e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Johansson v. Board of Animal Health*, 601 F.Supp. 1018, 1027 (D. Minn.1985); *Conner v. Carlton*, 223 So.2d 324 (Fla. 1969), *appeal dismissed for want of a substantial fed. ques.*, 396 U.S. 272, 90 S.Ct. 481, 24 L.Ed.2d 417 (1969).

As discussed in detail in this Court's findings of fact, animal carcasses are often left in public places, leading to an increased risk of disease. Additionally, the animals are often obtained from sources that have not maintained the animals in sanitary conditions; nor have the animals gone through any inspection process. This

⁵⁶ In *Middleton*, this Circuit held that any free exercise interest in marijuana use was outweighed by the compelling state interest in regulating drug use. *Middleton*, 690 F.2d at 825-26. The Court rejected various state court decisions permitting the religious use of peyote by the Native American Church as not binding and inconsistent with circuit precedent to the contrary. *Id.* at 826. See also *Peyote Way Church of God, Inc. v. Meese*, 698 F.Supp. 1342, 1346-49 (N.D.Tex.1988) (limited federal statutory exemption permitting Native Americans to use peyote was nothing more than a grandfather clause and the court would not expand it into a religious exception regardless of the sincerity of plaintiff's beliefs).

is especially dangerous when dealing with chickens, due to the increased risk of salmonella. Priests have no training in recognizing diseased animals, but rely solely on observation of the animals, an unreliable way of detecting disease. The City, therefore, has more than met its burden of proving that there is a substantial health risk generated by the killing of these animals in areas not regulated as slaughterhouses.

2) Welfare of Children

The governmental interest in guaranteeing the welfare of children is particularly strong. See e.g., *New York v. Ferber*, 458 U.S. 747, 756-58, 102 S.Ct. 3348, 3354-55, 73 L.Ed.2d 1113 (1982); *United States v. Nemuras*, 567 F.Supp. 87, 89 (D. Md. 1983), [1486] *aff'd*, 740 F.2d 286 (4th Cir.1984); *Griffin v. State*, 396 So.2d 152, 155 (Fla. 1981). The Supreme Court has held that the risk of emotional injury to children outweighs countervailing religious and parental rights. *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488, 504 (W.D.N.D. Wash.1967), *aff'd*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968).

The evidence at trial established that exposure to the ritual sacrifice of animals imperils the psychological well-being of children and increases the likelihood that a child will become more aggressive and violent. Based on the expert testimony, the City has shown that the risk to children justifies the absolute ban on animal sacrifice.

3) Cruelty to Animals

Equally compelling is the City's interest in the protection of animals from cruelty and unnecessary killing. "It has long been the public policy of this country to avoid unnecessary cruelty to animals." *Human Society of Rochester v. Lyng*, 633 F.Supp. 480, 486 (W.D.N.Y. 1986). The Florida Supreme Court observed more than two decades ago that "it is now generally recognized that legislation which has for its

purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968).

Plaintiffs presented testimony that the killing of the animals is not inhumane. This Court does not agree. Expert testimony established that the method of killing is unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal. Often the animals are kept in filthy, overcrowded conditions, and sometimes are not given adequate food or water. Additionally, the animals perceive both pain and fear during the actual sacrificial ceremony.

The policies and purposes underlying the ordinances therefore reflect three separate and compelling governmental interests; public health and the control of disease, the risk to children, and animal welfare. Moreover, the City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the City not zoned for slaughterhouse use. The interest of the city in prohibiting slaughter of animals in private homes and residential area is particularly strong. The assertion that the slaughter is for religious purposes does not diminish this interest because the City may regulate the place and manner of religious expression as long as there is no content classification and so long as the regulation is reasonable. See *Grosz*, 721 F.2d at 740.

An ordinance will withstand constitutional challenge if an exception for religious purpose will "unduly interfere with fulfillment of the governmental interest." *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982). Whether an exception for religious purposes would "unduly interfere" with government policy is a looser standard than whether an ordinance is "closely tailored" or the "least restrictive means" standards urged by Plaintiffs. Moreover, Plaintiffs have not shown that their proposed alternatives

would satisfy the public health and animal welfare concerns.⁵⁷ Plaintiffs simply speculate, without any factual support, that if they are allowed to practice openly, they would be able not only to control all aspects of the animal sacrifices in a way which would satisfy these concerns,⁵⁸ but that, through their example, all other practitioners of Santeria [1487] would conform their behavior to follow the same guidelines.⁵⁹

Most importantly, the carving out of an exception for any group would defeat the City's valid and compelling interests. Courts have consistently refused religious exemptions when they would create administrative or

⁵⁷ The alternatives do not address the issues of child welfare or the unreliable method of killing, among others.

⁵⁸ For example, Pichardo testified that the Church would follow any reasonable restrictions on how the animals are obtained and maintained, as well as how the carcasses are disposed of. While this Court believes that Plaintiff is sincere, this is simply not a workable solution because Pichardo himself admits that he doesn't even have an estimate of how many people practice Santeria in the City; nor does he know how those people obtain the animals or dispose of the carcasses. He can only speculate.

⁵⁹ Pichardo could give this Court no assurance that those who follow, in his eyes, a deviant form of Santeria, would conform to any regulations at all. Additionally, the religion has always been a secret religion and much is still not known. It is inconceivable that the religious practitioners would accept the type of regulatory controls on their activities that such conformity would require, especially in light of the fact that their sacrifice, by the terms of their religion, must be kept secret and cannot be monitored. A less restrictive ordinance simply could not be enforced.

enforcement problems. See e.g., *Sherbert v. Verner*, 374 U.S. 398, 408-09, 83 S.Ct. 1790, 1796-97, 10 L.Ed.2d 965 (1963); *Gross*, 721 F.2d at 739. The testimony revealed the extent of the problems caused by animal sacrifice. A large part of the problem is because of the number of practitioners, who are not limited to those who practice Santeria. It is often difficult, if not impossible, to tell who is responsible for a particular sacrifice. A religious exception for Santeria practitioners is simply unworkable because it is unenforceable. Any contemplated exception would have to cover all religions. See *United States v. Aguilar*, 871 F.2d 1436, 1469-70 n. 32 (9th Cir. 1989). The exception would, in effect, swallow the rule.

A balance of the compelling government interest served by the ordinances against the burden of Plaintiffs of not being allowed to ritually sacrifice animals, with all of the attendant risks to public health and animal welfare, must be resolved in favor of the City. Even absolute proscriptions of religious conduct are constitutional when the law serves a compelling state interest. See e.g., *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879) (cited with approval last Term in *Employment Division v. Smith*, 485 U.S. 660, ---, 108 S.Ct. 1444, 1451, 99 L.Ed.2d 753, 764 (1988)). Compelling governmental interests, including public health and safety and animal welfare, fully justify the absolute prohibition on ritual sacrifice at issue here, and any effort to exempt purportedly religious conduct from the strictures of the City's laws would significantly hinder the attainment of those compelling interests. Therefore, this Court holds that the challenged ordinances do pass constitutional muster.

D. 1983 Claim

This Court granted Summary Judgment as to the Mayor and City Councilmen and held that the ordinances and resolutions that they passed did not amount to

an official policy of harassment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 688 F.Supp. 1522 (S.D. Fla. 1988). At most, this Court found that Plaintiffs had alleged "nothing more than that Defendants, by their policies, created an atmosphere conducive to acts such as these taking place." *Id.* at 1529.

Where an injury is inflicted solely by its employees or agents, a local government is not liable. See *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509 (1981) (respondeat superior liability unavailable under § 1983). It is only when execution of a municipality's official policy or custom inflicts injury that the government as an entity can be held liable under § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Boilerplate allegations of municipal "policy," without any factual allegations to support them, do not establish a § 1983 claim against a municipality. See *City of Canton v. Harris*, 489 U.S. —, —, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412, 427 (1989). A single instance of unconstitutional conduct is insufficient to impose civil rights liability on a city unless there is proof that the activity was covered by an existing, unconstitutional municipal policy that can be attributed to a municipal policymaker. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985). The existence of an unconstitutional policy and its origin must be separately proved and [1488] where the policy relied on is not itself unconstitutional, the plaintiff is required to present more proof than a single incident to establish both the municipality's fault and the causal connection between the policy and the constitutional deprivation. *Id.*

Cases involving analogous constitutional challenges to municipal land-use restrictions place the burden of proving discriminatory purpose or intent on plaintiffs. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 n. 4, 106 S.Ct. 3172, 3178 n. 4, 92 L.Ed.2d 568 (1986);

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270, n. 21, 97 S.Ct. 555, 566, n. 21, 50 L.Ed.2d 450 (1977). Nor does evidence of a negative public outcry directed against the Church prove discriminatory zoning. See *Town of Hialeah Gardens v. Hebraica Community Center, Inc.*, 309 So.2d 212, 215 (Fla. Dist. Ct. App. 1975).

Plaintiffs have completely failed to prove any acts of discrimination or harassment in violation of Plaintiffs' right to freely exercise their religion. As discussed at length in this Court's findings of fact, the Plaintiffs' allegations of discrimination by the City are not supported by the facts.

CONCLUSION

The ordinances passed by the City of Hialeah regulating the ritual sacrifice of animals are consistent with both state statutes and the United States Constitution. The ordinances target the indiscriminate slaughter of animals in areas of the City not zoned for such activities because of the many attendant risks to both public health and animal welfare. The ordinances are not targeted at the Church of the Lukumi Babalu Aye and practitioners of Santeria, but are meant to prohibit all animal sacrifice, whether it be practiced by an individual, a religion, or a cult. Additionally, there was no proof of any discriminatory action by the City against the Plaintiff Church or any of its practitioners.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Court finds in favor of Defendant and against Plaintiffs, and FINAL JUDGMENT is hereby entered in favor of Defendant, CITY OF HIALEAH, and against Plaintiffs, who shall go hence without day. Each party shall bear its own costs and attorneys' fees.

DONE AND ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-5176

FILED

U.S. COURT OF APPEAL
ELEVENTH CIRCUIT

AUG 21, 1991

MIGUEL J. CORTEZ
CLERK

CHURCH OF THE LUKUMI BABALU AYE, INC.,

A non-profit corporation and
ERNESTO PICHARDO,

Plaintiffs-Appellants,

versus

CITY OF HIALEAH,

Defendant-Appellee.

Appeal from the United States District
Court for the
Southern District of Florida

A50

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion June 11, 1991, 11 Cir., 198 __, __ F.2d __).

Before FAY and COX, Circuit Judges, HENDERSON,
Senior Circuit Judge.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge

ORD-42

A51

CITY OF HIALEAH ORDINANCE NO. 87-40
Adopted June 9, 1987

WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and

....

Section 1. The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828 - "Cruelty To Animals" (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

....

CITY OF HIALEAH ORDINANCE NO. 87-52
Adopted September 8, 1987

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida;

....

Section 1. Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 "Definitions" and 6-9 "Prohibition Against Possession Of Animals for Slaughter or Sacrifice", which is to read as follows:

Section 6-8. Definitions

1. Animal - any living dumb creature.
2. Sacrifice - to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

3. Slaughter - the killing of animals for food.

Section 6-9. Prohibition Against Possession of Animals for Slaughter or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

CITY OF HIALEAH ORDINANCE NO. 87-71
Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community;

....

Section 1. For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

Section 2. For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

CITY OF HIALEAH ORDINANCE NO. 87-72

Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals on the premises other than those properly zoned as a slaughter house, in contrary to the public health safety and welfare of the citizens of Hialeah, Florida.

.....

Section 1. For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

Section 2. For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

.....

Section 6. This Ordinance shall not apply to any person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

CITY OF HIALEAH RESOLUTION NO. 87-66

Adopted June 9, 1987

WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and

WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.

NOW THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.

CITY OF HIALEAH RESOLUTION NO. 87-90

Adopted August 11, 1987

WHEREAS, the residents and citizens of the City of Hialeah have expressed their concern regarding the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida; and

.....

NOW THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, Florida. Any individual or organization that seeks to

practice animal sacrifice in violation of state and local law will be prosecuted.

**WEST'S FLORIDA STATUTES ANNOTATED
CHAPTER 828. CRUELTY TO ANIMALS**

828.12. Cruelty to animals

(1) A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or by a fine of not more than \$5,000, or both.

828.22. Humane slaughter requirement

....

(2) It is therefore declared to be the policy of this state to require that the slaughter of all livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods and to provide that methods of slaughter shall conform generally to those employed in other states where humane slaughter is required by law and to those authorized by the Federal Humane Slaughter Act of 1958, and regulations thereunder.

(3) Nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this act. For the purposes of this action the term "ritual slaughter" means slaughter in accordance with § 828.23(7)(b).

828.23. Definitions

As used in §§ 828.22 to 828.26, the following words shall have the meaning indicated:

....

(7) "Humane method" means either:

(a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical, or other means that are rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) A method in accordance with ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

828.24. Prohibited acts; exemption

(1) No slaughterer, packer, or stockyard operator shall shackle, hoist, or otherwise bring livestock into position for slaughter, by any method which shall cause injury or pain.

(2) No slaughterer, packer, or stockyard operator shall bleed or slaughter any livestock except by a humane method.

(3) This act shall not apply to any person, firm or corporation slaughtering or processing for sale within the state not more than 20 head of cattle nor more than 35 head of hogs per week.

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODE

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FEB 14 1992

OFFICE OF THE CLERK

3
NO. 91-948

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1991

**CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,**

Petitioners,

v.

CITY OF HIALEAH, FLORIDA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

**GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.**

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QUESTION PRESENTED FOR REVIEW

- (1) Whether the Free Exercise Clause of the First Amendment prohibits the City of Hialeah, Florida, from enacting ordinances which regulate the possession and killing of animals, including for ritual or sacrifice?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. The parties to the proceedings below and before this Court are Petitioners, The Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo, and Respondent, City of Hialeah, Florida.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1991

**CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,**

Petitioners,

v.

CITY OF HIALEAH, FLORIDA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Respondent, City of Hialeah, Florida, respectfully prays that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which was entered on June 11, 1991. The opinion was not reported, but is contained at Appendix A1-2 (hereinafter "App.") to Petitioners' Petition for Writ of Certiorari.

STATEMENT OF THE CASE AND FACTS

This litigation concerns the constitutionality of four ordinances adopted by the City of Hialeah, Florida in the summer of 1987 on the subject of possessing, slaughtering and sacrificing of animals within the City limits. Petitioners, the Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo, one of the priests of the Church, brought this action in September 1987 for a declaratory judgment, injunctive relief and damages against the City of Hialeah, the City Council and Mayor.

The District Court, Southern District of Florida (Spellman, J.), without a jury, conducted a seven day trial in July and August, 1989 on the issue of whether the City ordinances were unconstitutional under the First Amendment.^{1/} On October 5, 1989, the District Court rendered its fifty (50) page decision affirming the constitutionality of the City ordinances in all respects. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), App. A3.

The District Court expressly found that the intent of the City in enacting the ordinances was "to stop animal

^{1/} There were two other aspects to the District Court case. The first, claims against the Mayor and City Councilmen in their individual capacity, was concluded by a Summary Judgment in Defendants' favor entered on June 10, 1988. A second aspect of the case concerned claims that the City, in violation of 42 U.S.C. 1983, harassed and discriminated against the Church with respect to building permits and a variety of municipal services. After trial, the District Court rejected these claims in their entirety, finding that "Plaintiffs have completely failed to prove any acts of discrimination or harassment in violation of Plaintiffs' rights to freely practice their religion." *City of Hialeah*, 723 F. Supp. at 1488, App. A3. Plaintiffs did not appeal either of these rulings.

sacrifice whatever individual, religion or cult it was practiced by," 723 F. Supp. at 1479, App. A23, not "to interfere with religious beliefs." 723 F. Supp. at 1476, App. A23. The District Court determined that the ordinances were enacted to bar the "indiscriminate slaughter in areas of the City not zoned for such activities because of the attendant risk to both public health and animal welfare." 723 F. Supp. at 1438, App. A49. The District Court held, therefore, that the ordinances "have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484, App. A48. Because the District Court rendered its decision before the decision of this Court in *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), it also found that the ordinances regulated conduct rather than belief, had both a secular purpose and effect, and were justified by compelling governmental interests which outweighed any incidental effect upon Plaintiffs' religious practices. 723 F. Supp. at 1483-87, App. A36-47.

The United States Court of Appeals for the Eleventh Circuit, without dissent, entered a *per curiam* affirmance of the District Court judgment on June 11, 1991. On appeal, Plaintiffs argued that the District Court erred under standards decided in *Smith*. App. A2. The Eleventh Circuit noted that the District Court made extensive findings of fact, see *City of Hialeah*, 723 F. Supp. at 1469-1479, App. A4-28, which were not contested by Petitioners. The Eleventh Circuit held that the District Court properly concluded that the ordinances passed by the City were not prohibited by the First Amendment because the ordinances are directed at conduct and not belief, had a secular purpose and effect, and the governmental interests in safeguarding the health, welfare and safety of the community and preventing cruelty to animals outweighed any effect upon Petitioners' religious

activity. App. A2.^{2/} Noting that the District Court used an "arguably stricter standard" in determining whether the ordinances violated the United States Constitution than this Court did in *Smith*, 110 S. Ct. 1595 (1990), the Eleventh Circuit determined it unnecessary to decide the effect of *Smith* on this case.

The question in this case is whether a municipality may, consistent with the First Amendment and *Smith*, prevent tens of thousands of chickens, goats, ducks, and other animals from being uncleanly held, inhumanely killed, and unsafely discarded throughout the homes and streets of an urban community. The question is not whether Santeria is a religion, whether animal sacrifice is a central part of at least certain Santeria practices, nor whether the ordinances could apply only to practices that occurred in the Santeria church.

Santeria is a religion which is practiced in South Florida today by approximately 50,000 to 60,000 practitioners. 723 F. Supp. at 1470, App. A6. An unspecified number of these practitioners practice animal sacrifice. *Id.* Most of the alleged religious activity takes place in the individual homes of family groups and there is no intermingling between these groups. *Id.* In fact, few practitioners of Santeria know other practitioners outside their own group. *Id.* Petitioners' beliefs are based on the interpretation of an oral tradition and there is no organized

^{2/} Because it affirmed these reasons, the Eleventh Circuit did not address the District Court's reasoning contained in Part C(2) of its "Conclusions of Law" that the City's compelling governmental interest to prevent possible adverse psychological effects on children outweighed any incidental effect upon the Santeria religion. App. A2 n1.

worship, centralized authority, written code or tradition. *Id.* at 1471 n. 9, App. A8.

The sacrifice of animals, including chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles, are sacrificed as part of the rituals and ceremonies conducted by practitioners of Santeria. 723 F. Supp. at 1471, App. A9. A single initiation rite, for example, would involve sacrifice of between 20 and 30 animals. 723 F. Supp. at 1473, n. 22, App. A15, n. 22. As the District Court observed, in South Florida "that means that between 12,000 and 18,000 animals are sacrificed in initiation rites alone, during a one year period." 723 F. Supp. at 1473, n. 22, App. A15, n. 22. Most of the animals which are sacrificed are consumed as food after the sacrifice. *Id.*

Most of the animals which are sacrificed are bought either from botanicas or from local farms that breed the animals specifically for sacrifice. 723 F. Supp. at 1474, App. A17. These animals are kept in extremely overcrowded and filthy conditions. 723 F. Supp. at 1474, App. A17. In botanicas, the animals are often not fed and watered in light of their sale for immediate sacrifice. 723 F. Supp. at 1474, App. A17. Not surprisingly, the District Court expressly found that the animals suffer intensely under these conditions. 723 F. Supp. at 1474, App. A17.

Petitioners generally sacrifice an animal by puncturing the animal's neck with a knife in the hope that it will sever both of the main arteries of the animal. 723 F. Supp. at 1472, App. A12. This method of sacrificing animals is unreliable, inhumane, 723 F. Supp. at 1472-73, App. A12-13, and "in fact causes great fear and pain to the animal." 723 F. Supp. at 1473, App. A15.

Unfortunately, animal cruelty is but one dimension of the problem. The remains of the sacrificed animals create a health hazard because the remains attract flies, rats and other animals which serve as vectors of serious disease. 723 F. Supp. at 1474-75, App. A18-19. The animal's blood is drained into pots and left for an indeterminate time, even months or years. 723 F. Supp. at 1473, App. A14-15; R-9-278; R-10-379-80. Although most of the animals are consumed, some animals used in healing rites are not. 723 F. Supp. at 1471, n. 11, App. A9, n. 11. Moreover, the viscera of animals eaten must still be disposed somehow and animal remains, along with items reflecting sacrifice, were found in public places, 723 F. Supp. at 1474, App. A18, including intersections, backyards, railroad tracks, homes, rivers, and by the sides of roads. R-10-377-378. Animal carcasses have been found near rivers or canals, by stop-signs, under palm trees, behind the Dade County Courthouse, and on people's lawns or doorsteps. 723 F. Supp. at 1474, n. 29, App. A18, n. 29; R-14-1200; R-12-765; R-10-377. Petitioners admitted that they would be unable to monitor or control the way individual practitioners disposed of the sacrificed animals. 723 F. Supp. at 1471, App. A10.

Uncontradicted evidence established that rats, flies and other animals attracted to the remains may themselves carry and exchange diseases, increasing the risk of spread of disease to humans. 723 F. Supp. at 1474-75, App. A16-18. Areas where sacrificed animals are left can become a harborage for rats and fleas and the spread of disease to other animals and to humans is much more likely. 723 F. Supp. at 1475, App. A18-19. The potential diseases include dysentery, typhoid, cholera, salmonella, salmonosis, infectious hepatitis, yaws, trachoma, plague and many of the parasitic worms. 723 F. Supp. 1475, n. 33, App. A19, n. 33. The District Court found that the increased risk of disease and infestation and threat to the public health and welfare

caused by indiscriminate animal slaughter was a compelling governmental interest. 723 F. Supp. at 1485-1486, App. A41-44.

The City of Hialeah sought to combat the problems created by animal sacrifice by a series of four ordinances. On June 9, 1987, the City adopted an emergency ordinance (No. 87-40) which simply adopted the language of Florida's state anti-cruelty statute. On September 8, 1987, a second ordinance (No. 87-52) was adopted prohibiting the possession of animals intended for sacrifice or slaughter, except where zoned. Two further ordinances were adopted on September 22, 1987. No. 87-72 prohibited the slaughtering of animals on premises not properly zoned for that purpose, while No. 87-71 authorized registered groups to investigate animal cruelty complaints.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN SMITH.

Petitioners do not request certiorari jurisdiction on any ground other than an alleged conflict between the decision of the United States Court of Appeals for the Eleventh Circuit and decision of this Court in *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). The Court in *Smith* held that the free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote. It held that a valid and neutral law of general applicability need not be justified by a compelling interest, even if it places a burden on a religious practice. *Id.*, at 1599-1602. The Court also ruled that no balancing test is

required to deny an exemption to such a law for religiously motivated conduct. *Id.* at 1603-06.

Contrary to Petitioners' argument, *Smith* fully supports the decision in this case and did not expand their rights under the First Amendment. *Smith* held that a "neutral, generally applicable regulatory law may be applied constitutionally to religiously-motivated conduct without compelling justification." *Id.*, at 1601. The District Court expressly found that the challenged ordinances "were not passed to interfere with religious beliefs," but, instead, were intended to "stop the practice of animal sacrifice in the City . . . whatever individual, religion or cult it was practiced by." 723 F. Supp. at 1479, App. A28. The District Court stated that ordinances "have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484, App. A40. Because any burden on Petitioners' religious conduct generally is an incidental effect of a generally applicable and otherwise valid provision prohibiting animal sacrifice, the decision below does not conflict with *Smith*.

Petitioners ignore the express District Court findings and seize upon and misconstrue one passage in its fifty page opinion as a finding that the ordinances are not religiously neutral. The passage reads in its entirety: "Although the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah, the ordinances were not passed to interfere with religious beliefs, but rather to regulate conduct." 723 F. Supp. at 1476-77, App. A23. In context, it is clear that the District Court was referring to religious neutrality in the same sense as Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (concurring). See 723 F. Supp. at 1484 (citing *Wallace*), App. A40 (citing *Wallace*). The District Court uses religious neutrality to refer to the

fact that government action often benefits or burdens religious exercise, and thus is not strictly neutral toward religion. Thus, the District Court did not find that the ordinances are intended to discriminate against Santeria or, for that matter, against religion, a position that it clearly and emphatically rejected. See 723 F. Supp. at 1484, App. 40-41

Nevertheless, Petitioners claim that the ordinances discriminate on their face against religion because their references to "sacrifice" and "ritual" can only refer to religious conduct. A facial challenge to a statute on free exercise grounds, like any facial challenge, must establish that it is unconstitutional "in every conceivable application" or seeks to prohibit a broad range of protected conduct. See *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984). Contrary to Petitioners' argument, however, the ordinances prohibit possessing, sacrificing or slaughtering animals by any person for any reason, except in slaughterhouses, 723 F. Supp. at 1484, App. A40, which certainly is not unconstitutional. Moreover, the District Court found that the subject ordinances applied to a wide range of conduct other than Petitioners' sacrifices, such as sacrifices by satanic cults, voodoo and cockfighting, which are not protected conduct.^{3/} 723 F. Supp. at 1484, n. 53, App. A41, n. 53. Accordingly, Petitioners cannot persuasively argue that the ordinances, simply by referring to sacrifice or ritual, inherently define

^{3/} Petitioners conceded in their Brief before the Eleventh Circuit that "sacrifices" are performed by individuals who are not members of groups that are protected "religions" under the First Amendment, such as voodoo. See Brief of Appellants, at 9 ("nor should santeria be confused with voodoo, a Haitian phenomena so changed from its roots that "it is not, strictly speaking, an African religion any longer.").

and apply solely to religious conduct. See *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974) (upholding the ritual slaughter exception in Federal Humane Slaughter Act and noting that "ritual" is not synonymous with "religious").

Noting that both the State of Florida and City authorize the killing of animals (in slaughterhouses) for food, allow the selling of meat, permit hunting, fishing and trapping, sanction the extermination of rodents and lawfully administered euthanasia in animal subshelters, Petitioners illogically conclude that the City also must classify religion as an acceptable reason and permit animal sacrifices. However, the Court in *Smith* expressly held that a neutral law of general applicability could place an incidental burden on a religious practice. *Id.*, at 1599-1602. Moreover, even if the hunting of wild animals, extermination of rodents or euthanasia resulted in the health hazards and cruelty posed by animal sacrifice, the City constitutionally does not have to redress all such problems at the same time. See *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 1058, 71 L.Ed.2d 127 (1982); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 572, 79 L.Ed. 1086 (1935). Contrary to Petitioners' argument, the City does not have to prohibit all killing of animals under any circumstances to constitutionally prohibit animal sacrifice.

Petitioners also argue that the Eleventh Circuit's decision violates *Smith* because the ordinances' effect on Petitioners' religion is paramount. However, nowhere does *Smith* suggest that an otherwise neutral, generally applicable regulatory law is subject to greater scrutiny because of the degree of interference with religious conduct or the centrality of the religious practice. To the contrary, the Court directly rejected Petitioners' herein argument by stating: "The government's ability to enforce generally applicable

prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development . . . Nor is it possible to . . . requir[e] a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion." 110 S. Ct. at 1603-04 (citations omitted).

Petitioners further blatantly misrepresent the holding in *Smith* and argue that a compelling interest must be shown to deny an exception for conduct motivated by religious belief. However, the Court in *Smith* specifically rejected the identical argument in distinguishing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and its progeny of unemployment compensation decisions. The Court emphasized that it never had invalidated any governmental action under the *Sherbert* balancing test outside the unemployment compensation area. Indeed, the Court noted that in recent decisions it had declined to apply *Sherbert* outside the unemployment compensation field. Noting that *Sherbert* was developed in a context that lent itself to "individualized governmental assessment of the reasons for the relevant conduct", the Court concluded that the balancing test is simply inapplicable to challenges to generally applicable criminal laws. 110 S. Ct. at 1603.

Finally, Petitioners argue that the decision below conflicts with this Court's interpretation of the compelling interest test in *Smith* and prior cases. Although the District Court rendered its decision before *Smith* and applied the stricter framework of *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) to require both "compelling governmental interests" and a balancing approach if a law incidentally burdens religious conduct, under *Smith* it is not necessary to balance the burden imposed by a generally applicable, neutral ordinance on religious practice against the compelling state interest promoted by the ordinance. 110 S. Ct. at 1602-05. Indeed, the Court rejected a presumption of invalidity as applied to

the religious objector of every regulation of conduct that did not protect an "interest of the highest order." *Id.* at 1605. The Court then specifically cited the District Court opinion below as an example of an interest which could be protected without violating the First Amendment's protection of religious liberty. *Id.*, at 1605.^{4/} Accordingly, the lower court decision does not conflict with *Smith* -- it applied a stricter standard than *Smith*.

II. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISIONS OF THE FEDERAL COURTS OF APPEAL OR STATE SUPREME COURTS.

Petitioners do not seek certiorari jurisdiction on any grounds other than an alleged conflict with *Smith*. The Eleventh Circuit decision does not conflict with a decision of another United States Court of Appeals in the same matter

^{4/} The District Court findings certainly establish compelling governmental interests if *Smith* required such findings. First, that the City has a compelling interest in controlling disease is beyond dispute. See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Johansson v. Board of Animal Health*, 601 F. Supp. 1018 (D. Minn. 1985). The City also has a compelling interest protecting animals from the cruelty of animal sacrifice. See *Humane Society of Rochester and Monroe County For Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 280 (D. Mass. 1986), *aff'd*, 802 F.2d 440 (1st Cir. 1986), *aff'd*, 802 F.2d 440 (1st Cir. 1986). Finally, the City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the City not zoned for slaughterhouse use. In *re Slaughter-House Cases*, 16 Wall. 36, 83 U.S. 36, 21 L.Ed. 394 (U.S. 1872).

or with a state court of last resort. In fact, a review of federal and state law indicates that the Eleventh Circuit's decision is the only reported decision involving whether animal sacrifice can be regulated consistent with the protections afforded by the First Amendment. Accordingly, the lower court decision is wholly consistent with *Smith*, its progeny, see, e.g. *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 931-34 (6th Cir. 1991); *Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1103, 113 L.Ed.2d 214 (1991); *Yang v. Sturner*, 750 F. Supp. 558, 559-60 (D.R.I. 1990), and the free exercise cases which preceded *Smith*. See, e.g., *United States v. Lee*, 455 U.S. 252, 263, n.3, 102 S.Ct. 1051, 1058, n.3, 71 L.Ed.2d 127 (1982).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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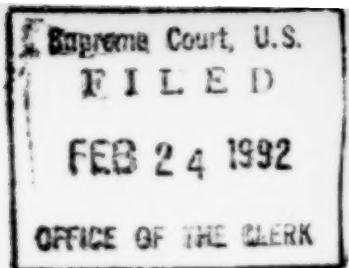
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and forty (40) copies of the foregoing Respondent's Brief in Opposition were sent by United States Mail, First Class Postage prepaid, to the CLERK OF THIS COURT, and a copy of the foregoing was sent by United States Mail, First Class Postage Prepaid, to the following counsel of record: DOUGLAS LAYCOCK, ESQ., 727 East 26th Street, Austin, Texas 78705, and one copy was sent by U.S. Mail to each of the following counsel: JEANNE BAKER, ESQ., American Civil Liberties Union Foundation of Florida, 225 N.E. 34th Street, Miami, Florida 33137; JORGE A. DUARTE, ESQ., 2503 SW 27th Avenue, Miami, Florida 33133; and MITCHELL HORWICH, ESQ., Horwich & Zager, P.A., 1541 Sunset Drive, Coral Gables, Florida 33143, this 14th day of February, 1992.

RICHARD G. GARRETT

01/13/92/00000000-0000.PET

(4)
No. 91-948



IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

**CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,**

Petitioners,

vs.

CITY OF HIALEAH,

Respondent.

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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ARGUMENT

I. The City's Argument Confirms that Important Issues Are Raised Regarding the Meaning of *Employment Division v. Smith*.

This case turns on the meaning of this Court's momentous decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The parties and the courts below fundamentally disagree over the meaning of that opinion. What are the neutral and generally applicable laws that can be applied to religious exercise? What is the meaning of the compelling interest test that applies to laws that are not neutral and generally applicable?

A. **Neutral and Generally Applicable.** The City claims that the ordinances in this case are neutral and generally applicable. Petitioners think it almost self-evident that they are not. The central disagreement does not concern the scope of the ordinances. Rather, the disagreement is over the meaning of the Court's new constitutional standard.

The City agrees that Santeria is a religion, Br. Opp. 3, that animal sacrifice is part of that religion, *id.* at 4, and that the ordinances were intended to stop animal sacrifice, *id.* at 7.

The City agrees that both the City and State permit the killing of animals for food, hunting, fishing, trapping, extermination, and euthanasia. *Id.* at 9. It does not dispute Petitioners' listing of other permitted reasons. Pet. 10. These lists would seem to exhaust the significant secular reasons for killing animals. The question presented is whether ordinances are neutral and generally applicable when they forbid one reason for killing animals and permit all other reasons for killing animals. May a city enact ordinances that are carefully drafted to suppress a religious practice without inconveniencing any significant secular

practice, and then defend those ordinances as neutral and generally applicable under *Smith*? In short, what is a "neutral and generally applicable law"?

The City's reading of *Smith* is most clearly revealed at page 9 of its Brief in Opposition. In the first full paragraph on that page, the City explicitly claims the power to single out religion for special prohibition. It concedes that it accepts most secular reasons for killing animals, and then it says: "Petitioners illogically conclude that the City also must classify religion as an acceptable reason." Br. Opp. 9. This "illogical" conclusion is the absolutely minimum content of the Free Exercise Clause -- that the City cannot "ban such acts or abstentions only when they are engaged in for religious reasons." *Smith*, 494 U.S. at 877.

The City goes on to assert that it can single out religious reasons for killing animals *even if secular and religious killings of animals present the same evils*. Br. Opp. 9. "[T]he City constitutionally does not have to redress all such problems at the same time." *Id.* It cites for this proposition an economic substantive due process case about the regulation of dentists. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).¹ The City claims it can proceed one step at a time even if its first and only step is to suppress a constitutionally protected worship service.

The City's one-step-at-a-time argument turns *Smith* and the First Amendment on their heads. One-step-at-a-time approaches are the antithesis of generally applicable laws. Activity singled out for special constitutional protection is in Hialeah singled out for special prohibition.

¹ The City also cites a wholly inapplicable passage from *United States v. Lee*, 455 U.S. 252, 259 (1982). *Lee* held that religious objectors could be subjected to generally applicable taxes, because there was a compelling interest in refusing exemption. *Lee* said nothing about singling religion out for special taxation or regulation.

The courts below accepted the City's claim. The district court said, in a part of the opinion adopted by the court of appeals:

Further, even if the use of the words "ritual" and "ceremony" are understood as targeting primarily religious conduct, nothing in the First Amendment prevents a municipality from specifically regulating such conduct when it is deemed inconsistent with public health and welfare.

App. A40.

The issue is therefore squarely posed. The City and the courts below believe that it is permissible to single out religious practices for special prohibition. Petitioners believe that *Smith* forbids such special prohibitions unless they are justified by a compelling government interest. This Court should grant certiorari to clarify what it meant in *Smith*.

The issue is not eliminated by the City's examples of allegedly secular killings allegedly forbidden by these ordinances. The only such examples offered are cockfighting and voodoo or satanic sacrifices. Br. Opp. 8. Each of these examples is disputed,² but these disputes are irrelevant to the issue presented. No resolution of these disputes would make the ordinances generally applicable, so the City's hypotheticals cannot prevent this Court from deciding what it means for ordinances to be generally applicable.

Petitioners claim that these ordinances single out a despised minority religion for special restrictions. The City

² The City offered no evidence to show whether voodoo and satanism are religious or secular, and no issue respecting those groups is presented. The ordinances at issue do not appear to forbid cockfighting, because the birds are not killed for food and a cockfight is not easily described as a ritual or ceremony. Cockfighting is illegal in Florida but widespread in Hialeah, and enforcement is sporadic. See R10 at 453-69.

responds that the ordinances might also apply to two other groups who are even more despised and whose religious status is disputed, and to a disreputable recreation that has long been illegal under other laws. This response is no response at all. The logic of *Smith* is that if religious minorities are subject only to generally applicable laws, they will be protected by the political process. Legislatures can impose on religious minorities only those laws they are willing to impose on all their constituents. There is no such guarantee of political protection in a claim that a law applies to two or three small and unpopular minorities instead of one. Such a law is *not* generally applicable.

The City's argument amounts to little more than claiming that it has a reason for suppressing Petitioners' religion. This is apparently what the district court meant when it said that the ordinances' effect on religion "is incidental to the ordinances' secular purpose and effect." Pet. App. A40. But a secular purpose for suppressing religion goes to the compelling interest issue, not to the general applicability issue. Having an alleged reason for a narrowly targeted law does not increase the law's scope or make it generally applicable. If the City claims to have reasons for a narrowly-targeted suppression of religion, those reasons are subject to judicial review under *Smith*'s compelling interest standard. The City is attempting to escape that review by reading all content out of *Smith*'s requirement of neutrality and general applicability. Once again we come to the same conclusion: the Court must grant certiorari to clarify *Smith*.

B. Compelling Interest. The City says little about the compelling interest issue, but its one-step-at-a-time argument confirms that that issue and its subparts are squarely presented. Petitioners argue that the City must show a compelling reason for discriminating against religion, and that it cannot rely on compelling interests that it does not pursue in other contexts. The City disagrees, insisting that it can single out

religious conduct even if secular conduct causes the same evils. Br. Opp. 9.

The courts below equated the compelling interest test with the rational basis test; they treated any legitimate state interest as a compelling interest. The City implicitly adopts that position with its one-step-at-a-time argument, drawn directly from the rational basis cases. Br. Opp. 9. Thus, fundamental questions about the meaning of the compelling interest test are also squarely at issue in this case.

II. The Decision Below Conflicts With This Court's Intervening Decision in the Son of Sam Case.

Subsequent to the petition for certiorari, this Court decided *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991). *Simon & Schuster* strongly supports Petitioners' reading of *Smith*: a law that singles out First Amendment activity for different and hostile treatment can be justified only by a compelling interest in the statutory classification -- not by more general interests that are not generally pursued.

Simon & Schuster found compelling interests in compensating crime victims and in depriving criminals of the fruits of their crime. *Id.* at 509-10. But the Court unanimously held these compelling interests irrelevant, because they did nothing to justify New York's distinction between income and assets from publications and income and assets from all other sources. *Id.* at 510. The fatal defect was that "the distinction drawn by the Son of Sam law has nothing to do with the State's interest." *Id.* (emphasis added).

There, as here, the law was not generally applicable. There, as here, the law singled out an activity protected by the First Amendment. There, as here, the state relied on general interests that it did not pursue in other contexts. *Simon & Schuster* and the decision below are squarely in

conflict; the only difference is that one case involves speech and the other religious exercise.

Justice Kennedy, concurring, would have gone further. He would abandon the compelling interest test in this context and apply an absolute rule against content discrimination, subject to certain narrowly-defined categorical exceptions. *Id.* at 512-15. Similar reasoning here would lead to an absolute rule prohibiting discrimination against religion. Justice Kennedy's proposal builds from an insight also set forth in the Petition for Certiorari in this case: "it is hard to imagine a compelling need to discriminate against religion." Pet. 17. Justice Kennedy's absolute rule would avoid the temptation to rationalize discrimination against unpopular minorities.

III. This Case Was Not Previously Decided in a String Cite.

In *Employment Division v. Smith*, this Court cited the opinion below in a string cite of cases illustrating the range of potential conflicts between religious practice and government regulation. 494 U.S. at 889. The City seems to think that this citation represents a decision on the merits. Br. Opp. 11. Such a decision would be without briefing, argument, or a record, without seeing the ordinances, without knowing that the ordinances single out religious practice. Obviously the Court intended no such wholesale disregard of due process and its own rules; to spell out the City's argument is to refute it.

CONCLUSION

The issues are important, and the City's response confirms that they are squarely presented. The writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States
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CHURCH OF THE LUKUMI BABALU AYE, INC. AND
ERNEST PICHARDO,

v.

Petitioners,

CITY OF HIALEAH,

Respondent.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF JAMES ANDREWS AS
STATED CLERK OF THE PRESBYTERIAN CHURCH
(U.S.A.), THE CATHOLIC LEAGUE FOR RELIGIOUS
AND CIVIL RIGHTS, THE CHRISTIAN LEGAL
SOCIETY, THE FIRST LIBERTY INSTITUTE, AND
THE RUTHERFORD INSTITUTE, IN SUPPORT
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QUESTIONS PRESENTED

Whether city ordinances specifically directed at the ancient and bona fide religious practices of ritual animal killing violate the Free Exercise Clause of the First Amendment in the absence of an articulated compelling governmental interest in public morals, health, or safety.

Whether the Court should reaffirm its teaching that the Free Exercise Clause mandates governmental neutrality, not official hostility, toward religion.

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INTERESTS OF AMICI CURIAE

Amici curiae are national and international organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. None of the *amici* espouses or endorses the doctrines or practices of petitioners, and many of the *amici* organizations consider those practices morally repugnant. Nonetheless, *amici* are committed to the proposition that all sincere religious practices are equally entitled to the protection of the law, and are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

REASONS FOR GRANTING THE WRIT

This case involves a series of ordinances passed by the City Council of the City of Hialeah, Florida (hereinafter "Hialeah"), in June and September, 1987. These ordinances were specifically intended to stop the ritual sacrifice of animals, a religious practice that is apparently offensive to some of Hialeah's citizens. Neither Hialeah nor the State of Florida generally prohibits the killing of animals. One can get Chicken McNuggets in Hialeah, but one may not kill a chicken for religious reasons. Neither Hialeah nor the State of Florida prohibits the killing of animals under secular circumstances that raise identical (or even more serious) concerns of cruelty to animals, public health or zoning. These concerns were the sole reasons cited by the court of appeals to justify the ordinances. The ordinances are thus "specifically directed at [petitioners'] religious practice" and are therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990).

Amici wish to make four related points. First, the practice of animal sacrifice, though contrary to the religious convictions of many, is an ancient, long-standing, well-established, sincere religious practice. Indeed, the sort of animal sacrifice practiced by the Church of the Lukumi Babalu Aye is not dissimilar to the practices ordained for the people of Israel by the Holy Bible. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires governmental neutrality toward religion. Although the district court expressly found that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah," Pet. App. 23, it

nonetheless upheld the ordinances.¹ Third, the purported governmental interests invoked by the district court are insufficient as a matter of law because they do not justify the differential treatment meted out to those who kill animals out of obedience to religious command and those who kill animals for food, science, pest control, animal population control or sport. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. Agencies of the federal and state governments as well as the lower courts have in many instances misconstrued this Court's teaching in *Smith*. When, as here, agencies of government turn a blind eye toward invidious discrimination against a vulnerable religious minority, it is time for this Court to clarify that *Smith* does not countenance official hostility toward religion.

I. ANIMAL SACRIFICE IS AN ANCIENT AND SINCERE RELIGIOUS PRACTICE THAT IS PROTECTED UNDER THE FIRST AMENDMENT

Animal sacrifice may now seem abhorrent to many Americans, but it remains an integral part of religion in much of the world. The roots of this practice lie in the ancient history of what are now Judaism, Christianity, and Islam. Indeed, the practices the City seeks to prohibit

¹ Reference is frequently made in this brief to the opinion of the district court because the court of appeals largely adopted the analysis of the district court in an unpublished per curiam order. Pet. App. 2.

are virtually indistinguishable from the practices of animal sacrifice mentioned throughout the Bible. E.g., Leviticus, chapters 1-7 (the requirements in Torah for animal sacrifice); I Kings 8:62-66 (animal sacrifice at the dedication of Solomon's temple); Luke 2:22-24 (ritual sacrifice on behalf of Joseph and Mary at the eighth day following the birth of Jesus Christ); see R. deVaux, *Ancient Israel: Its Life and Institutions* 415-23 (1961); R. deVaux, *Studies in Old Testament Sacrifice* (1964); Gaster, "Sacrifices and Offerings, OT," in 4 *Interpreter's Dictionary of the Bible* 147-59 (1962) (collecting and discussing biblical texts referring to animal sacrifice). In Islamic faith 'Id al Adha is the festival of sacrifice, on which devout Muslims throughout the world join the pilgrims in Mina in sacrificing a small animal in remembrance of the sacrifice of a ram by Abraham in place of his son Ishmael. See *The Qur'an* 37:102; and see Schimmel, "Islamic Religious Year," 7 *Encyclopedia of Religion* 456 (M. Eliade ed. 1987).

Profound theological reasons – having nothing to do with cruelty to animals – explain why animal sacrifice was abandoned in the Jewish religion and was never practiced in the Christian religion. But those theological reasons do not bind the Church of the Lukumi Babalu Aye and must not be imposed upon them. In the Jewish faith, sacrifice was abandoned when the Romans destroyed the Second Temple in 70 A.D.² In the Christian

² Worship in ancient Israel occurred at several shrines. After the reform initiated under King Josiah (640-609 B.C.E.), however, the priestly and sacrificial functions were exclusively tied to the Jerusalem Temple and could not be performed elsewhere. The Temple of Solomon was destroyed by the

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faith, animal sacrifice is no longer practiced because of the theological view that it was rendered forever unnecessary by the ultimate sacrifice of the pure Lamb of God on the cross at Calvary; see, e.g., Letter to the Hebrews 7:27; 9:1-23; 10:1-10; 1 Peter 1:18-19; 1 John 1:7; 2:2; Rev. 5:9; 7:14; 12:11.

These theological developments make many in the Christian and Jewish faiths reluctant to defend a practice today that seems so foreign to their own doctrines. But the sensibilities of the majority are no test of religious truth, and members of minority religions have no less right to practice their faith merely because others recoil from it. Animal sacrifice is not "unnecessary" killing, as the City, the State Attorney General and the district court have labeled it. Viewed from the only perspective permitted under the First Amendment – that of the religious adherents – sacrifice is utterly vital, an indispensable aspect of their worship. Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to practice their rituals as they have been practiced for 4,000 years. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates

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Babylonians in 587 B.C.E. After the return from the exile in 535 B.C.E., the Jews built a Second Temple in Jerusalem, which the Romans destroyed in 70 A.D. Some Jews believe that the sacrifices commanded in the Hebrew scriptures should be resumed if the Temple is restored in Jerusalem. A dissident group of Samaritan Jews still continues the ancient practice of sacrifice on Mount Gerizim in Samaria.

of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 15, reprinted at 330 U.S. 63, 71.

II. THE ORDINANCES UNDER CHALLENGE ARE UNCONSTITUTIONAL BECAUSE THEY ARE SPECIFICALLY DIRECTED AT A RELIGIOUS PRACTICE AND ENTANGLE THE CITY IN THEOLOGICAL JUDGMENTS

As the district court acknowledged, the ordinances under challenge "are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah." Pet. App. 23. They are unconstitutional for that very reason.

Ordinance 87-71 prohibits animal "sacrifice" in "a public or private ritual or ceremony not for the primary purpose of food consumption." The killing of animals is not illegal in Hialeah. Only the killing of animals in a "ritual or ceremony" is illegal. The ordinance is "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990). Indeed, this ordinance cannot be distinguished from an example given by this Court in *Smith*:

It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that

are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. The ordinance may be contrasted with the Oregon anti-drug law upheld in *Smith*. That law applied to everyone, and the Supreme Court held that no exception was required for the Native American Church. Here, there is no law against killing animals, but a special exception was made to prohibit killing animals in a ritual or ceremony.³

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause.⁴ Indeed, even those scholars who have espoused a narrow interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority.⁵ Locke wrote:

³ It is no answer to say that there may be some non-religious rituals or ceremonies to which the ordinance may apply. No such occasions have occurred in Hialeah, and it is undisputed that the ordinance was adopted in specific response to the petitioners' announcement of the opening of a church. Pet. App. 22-23.

⁴ See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990).

⁵ E.g., W. Berns, *The First Amendment and the Future of American Democracy* (1985); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978).

"Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses."⁶ Indeed, as if anticipating this very case, Locke specifically defended the right to animal sacrifice so long as animals were killed for food: "if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. . . . [W]hat may be spent on a feast may be spent on a sacrifice."⁷ The ordinances here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause, and the view of the founders that religious freedom is an inalienable right. See Declaration of Independence, 1 Stat. 1 (1776).

Ordinance 87-52 is unconstitutional for the same reason. Paragraph 1 forbids any person to sacrifice or slaughter certain animals "intending to use such animals for food purposes." Paragraph 2 includes within the ban "any group or individual that kills, slaughters or sacrifices animals for any type of ritual," whether or not the flesh is consumed. Paragraph 3 exempts licensed slaughterhouses and other uses permitted under state and local law. When the fog clears, the only killing of animals this ordinance prohibits is that for religious purposes.

⁶ J. Locke, "A Letter Concerning Toleration," in 35 *Great Books of the Western World* 13 (R. Hutchins ed. 1952).

⁷ *Id.* at 12-13.

Ordinance 87-72 forbids the "slaughter" of animals except in licensed slaughterhouses or by individuals or groups who slaughter "small numbers of hogs and/or cattle." This ordinance is susceptible to more than one interpretation. Many persons in Hialeah kill animals for various purposes, including for food, but are not deemed to fall within the strictures of the ordinance (apparently because the killing is not in large quantities or for commercial purposes). For example, hunters kill animals for domestic consumption or for the sport of it, and fishermen kill fish for the same reasons, but their actions are not deemed to fall within the ordinance. Like hunters and fishermen, petitioners kill animals and often eat them, but they do not do so in large quantities or for commercial purposes. Either the ordinance does not apply to petitioners' church, which does not slaughter animals commercially for food, or the ordinance has been applied on a discriminatory basis, in violation of *Smith*. See Pet. at 14.

Moreover, if petitioners are deemed to be engaged in the "slaughter" of animals during their rituals, and thus subject to Ordinance 87-72, they are protected under Florida state law, which specifically allows "ritual slaughter." Fla. Stat. Ann. § 828.22(3) (1985). The Florida Attorney General has opined that petitioners are not protected by this statute because they are engaged in "sacrifice" rather than "slaughter," and that the exemption for ritual slaughter applies only to "the killing of animals for food." Fla. Att'y. Gen. Opin. 87-56, Annual Report 146, 149 (1987). The Florida authorities cannot have it both ways. Either petitioners' activity constitutes "slaughter"

and is protected under state law, or it does not, in which case Ordinance 87-72 does not apply.

Ordinance 87-40 provides that anyone who "unnecessarily . . . kills any animal . . . in a cruel or inhumane manner, is guilty of a misdemeanor." This ordinance presents two constitutional problems.

First, the government has no authority to determine which religious rituals are "necessary" and which are not. Nor may it determine that religious activities in general are "unnecessary." This is a theological judgment, outside the ken of government. To the members of the Church of the Lukumi Babalu Aye, the sacrifice of animals is truly necessary, as necessary to them as the Mass is to a Catholic or keeping the Sabbath is to an observant Jew (and more necessary than other forms of killing permitted in Hialeah).

In this respect, the ordinance is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. 872, 110 S. Ct. at 1603. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. 872, 110

S. Ct. at 1603. Here, the City allows the killing of animals (even "in a cruel or inhumane manner") where the killing is "necessary." This requires an individuated determination. Having set up such a system, the City may not refuse to extend it to cases of religious necessity.

In effect, the City has declared the central religious practice of the Church of Lukumi Babalu Aye "unnecessary," while exempting a wide variety of secular activities from the strictures of Ordinance 87-40. That is a judgment the government has no authority to make.

The second constitutional problem with Ordinance 87-40 is that its definition of "cruel or inhumane" methods of killing has been applied in a discriminatory fashion. As the evidence below showed, petitioners' method of animal sacrifice is painless and quick in almost all cases. The district court, however, credited testimony that there is "no guarantee" that this will always be the case. Pet. App. 13. Yet the City has allowed other forms of killing, including hunting and extermination, that are likely to cause more pain and fear in animals. It is only the religious killing of animals that is required to provide an iron-clad "guarantee" of humaneness.⁸

⁸ The district court required the petitioners to prove that no serious risk of harm would result from their worship services. Pet. App. 13, 45-46, 46 n. 59, discussed in Pet. at 21-22. The burden of demonstrating harm, however, falls on the government, not a religious claimant. The district court thus inverted the entire concept of who is supposed to be restrained by the free exercise clause from doing what and to whom.

Accordingly, each of the ordinances under challenge is constitutionally flawed. One prohibits a religious practice on its face (Ord. 87-71). Two more do so by interpretation of their terms (Ord. 87-40 and 87-52). And the fourth does so by discriminatory application of commercial regulations to a noncommercial religious practice (Ord. 87-72). If the City wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the City might be forced to reconsider how powerful its interests are in this matter if it had to apply the same rules to hunting and other socially acceptable forms of killing that it applies to this unfamiliar and unpopular minority religion.

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

The district court was blind to the discrimination present in the Hialeah ordinances. Pet. App. 49. Even though the district court acknowledged that the kosher laws of the Jewish faith are protected by state law and are thus effectively gerrymandered out of the Hialeah ordinances, Pet. App. 31, it ignored the Court's teaching on this subject, adumbrated in earlier cases such as *Larson v. Valente*, 456 U.S. 228 (1982). Since the district court reached its decision before this Court's decision in *Smith*, it obviously intimated no view on that case.⁹

⁹ This Court's inclusion of this case in a string citation in *Smith*, 110 S.Ct. at 1605, cannot be viewed as a determination of
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Ruling after this Court's decision in *Smith*, the court of appeals can only be construed to have misunderstood or to have ignored the Court's teaching on religious discrimination. Both the petitioners and *amici* emphasized this point in their briefs before the court of appeals, but that court merely declined to "decide the effect of *Smith* in this case." Pet. App. 2.

One of the reasons the Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not "water[ed] down" but rather "really means what it says." 494 U.S. 872, 110 S. Ct. at 1605. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.*

The district court purported to find the City's interest in enforcing the ordinances against animal sacrifice "compelling," Pet. App. 43-45, but it committed a basic error in this analysis. In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest.

Amici doubt that the government *ever* could have a compelling interest in forbidding for religious purposes

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the merits of the case before it had been subjected to the rigorous review of First Amendment claims required under *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Indeed, the very fact that the court of appeals did not undertake its responsibility under *Bose* is an independent reason for granting the writ.

an activity it permits for other purposes. See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 60 U.S.L.W. 4029, 4034-35 (Dec. 10, 1991) (Kennedy, J., concurring) (when government restricts speech by discriminating on the basis of the content of the message, it should not be allowed to prevail even by a showing of a compelling interest for the discrimination). Certainly no such interest was demonstrated here. As the petition ably shows, there are many secular activities that pose the same (or worse) threat to the government's interest than is posed by petitioners' religious services. Unless the City can justify singling out religion for peculiar burdens (and it has not even tried), the ordinances must be struck down.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

IV. THIS COURT SHOULD REAFFIRM ITS CONDEMNATION OF OFFICIAL HOSTILITY TO RELIGION

Smith clearly marked a major shift in free exercise doctrine. As with any new formulation of doctrine, this one may take some adjustment and fine tuning before it becomes settled. After *Smith*, governmental agencies have

recklessly disregarded the protections that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the local level, zoning laws have been invoked – as they were here – both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. See, e.g., *Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, app. denied, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-*Smith* cap on enrollment of students in parochial school); and see R. Niebuhr, "Here Is The Church," *Wall Street J.*, Nov. 20, 1991, at A1, col. 4. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had regulations purporting to tell the Amish what to wear when they raise a barn. See, e.g., OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).¹⁰

The judicial record after *Smith* also betrays a similar insensitivity to religious liberty that may eventually require this Court to reconsider its teaching in *Smith*. For example, in *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring an autopsy was applied to an

¹⁰ This exemption was recently reinstated pending administrative review.

Orthodox Jew who died in an auto accident, even though this regulation placed a significant burden on a sincerely held religious tenet. This sacrilege was justified by a strikingly unimportant governmental interest, and was manifestly not the least restrictive alternative means of effectuating the government's interests in ascertaining the cause of death of its citizens. In *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990), another district court "regretfully" dismissed on the basis of *Smith* its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of this Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored this Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions. See *Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In *Salvation Army v. Dep't of Community Affairs*, 919 F. 2d 183 (3d Cir. 1990), the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious

need to know the identity of the down and outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements – which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program – by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under *Smith* analysis, however, the bureaucracy wins, and the nuns and the homeless lose. See Sam Roberts, "Fight City Hall? Nope, Not Even Mother Teresa," *New York Times* Sept. 17, 1990, at B1, col 1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

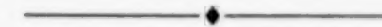
This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. See, e.g., P. Irons, *The Courage of Their Convictions* 22-23 (1988).

This Court could not have intended all of the far-reaching and outrageous results discussed above, whether in the 1940s or in the 1990s. It may be premature for the Court to undertake a review of its teaching in *Smith*, and *amici* note that the Petitioners do not request the Court to do so in this case. But it is not too early for the Court to correct some profound misunderstandings of what this Court actually said in *Smith*. This case is an apt vehicle for the Court to clarify at once that the *Smith* case did not contemplate a casual attitude among the judiciary about religious discrimination. On the contrary, as suggested in Part III above, the *Smith* court taught more emphatically than before that when a statute or ordinance targets a religious practice for hostile treatment – as the Hialeah ordinances at issue here do – that result can only be justified by a truly compelling governmental interest *in religious discrimination* and by a showing that the governmental burden placed on religion by the regulation is the least restrictive alternative. No such showing was required or made in the courts below.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of

governmental hand." See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 126 (1964). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the framers could ever have anticipated 200 years ago.

As the nation celebrates the bicentennial of the Bill of Rights, it is time for this Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did in Hialeah with such ill-disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." *The Williamsburg Charter* 8 J. Law & Relig. 5, 8 (1990).



CONCLUSION

This case presents important issues in need of review at once. The Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

James E. Andrews, as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.), a national Christian denomination with nearly 3 million members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. In joining this brief the Stated Clerk wishes to make six statements: (1) The Church entirely rejects and has never participated in the practice of animal sacrifice. As early as 1875, the General Assembly condemned all acts of cruelty to animals as "utterly abhorrent to the spirit of the Gospel," and addressed cruelty to animals again in 1990. (2) Cruelty to animals is a serious matter, but not one made worse by animal sacrifice for religious reasons. (3) Animal sacrifice is an ancient religious practice predating even Judaism, Christianity, and Islam. (4) The beliefs held by the petitioners are sincerely held and are protected by the First Amendment. (5) In "God Alone Is Lord of the Conscience," a policy statement regarding religious liberty adopted in 1988 by the 200th General Assembly, the Church stated: "Churches have a right of autonomy protected by the Free Exercise Clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention. The government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside in specific instances and government permitted to interfere with internal church activities." (6) This case exemplifies the disturbing trend of courts to broadly misapply this Court's ruling in *Employment Division v. Smith*

and thus harshly burden the free exercise of religion. The Stated Clerk urges this Court to grant the writ to rectify the broad misapplication of the *Smith* decision in this case and to provide needed guidance to other courts. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the members of the Church.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the strong protections afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Protestants, Catholics, Jews, and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated

the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

First Liberty Institute (FLI) at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The Rutherford Institute and its affiliates are non-profit corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With 40 state chapters, international chapters in several countries on three continents, and international headquarters in Charlottesville, Virginia, the Rutherford Institute assists litigants and participates in significant cases relating to the right of religious freedom. The Institute has specialized in litigation in state and federal courts and has participated as counsel for *amici curiae* in numerous cases before this Court.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.,
and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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¹ These items are also printed in the Appendix to the Petition for *Certiorari*, but minor errors occurred in the printing of Ord. 87-72 and Fla. Stat. Ann. §828.12. For convenience, all these related items are reprinted together in the Appendix to Petitioners' Brief.

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

**CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,**

Plaintiffs,

vs.

CITY OF HIALEAH,

Defendant.

RELEVANT DOCKET ENTRIES

[formal matters omitted in printing, including names and addresses of counsel, names of additional defendants who are no longer parties, initials of clerks who made docket entries, and summary of case on cover sheet]

DATE NR PROCEEDINGS

1987

SEPT 25 1 COMPLAINT.
.....

OCT 19 4 ANSWER of City of Hialeah.
.....

12 20 RESPONSE to affirmative defenses, by
pltf.
.....

1988

FEB 23 22 MOTION for Final S/J, by defts' Silvio
Cardoso, Salvatore D'Angelo, Herman
Echevarria, Julio Martinez, Andres
Mejides, Paulino Nunez, Ray Robinson,
& Raul Martinez.

23 23 MEMO in supp of M/Final S/J, by

defts'.

23 24 STATEMENT of undisputed material facts, by defts'.

• • •

MAR 11 33 MEMO in opp to M/Final S/J by pltfs'.

21 34 REPLY memo in supp of M/Final S/J, by defts Silvio Cardoso, Salvatore D'Angelo, Herman Echevarria, Julio Martinez, Andres Mejides, Paulino Nunez, Ray Robinson.

• • •

APR 4 36 NOTICE of filing Official Minutes of the Hialeah Cty Clk, by pltf.

• • •

JUN 13 41 MEMO OPINION & ORDER (EPS 6/10/88) Granting S/J in favor of deft councilmen & Mayor (EOD 7/17/88-M-CAP).

• • •

SEP 14 52 MOTION for prel & Perm inj & declaratory relief, by pltfs.

14 53 MEMO in supp of M/prel inj & declaratory relief, by pltf.

• • •

OCT 14 60 MEMO in opp to pltfs' mot for prel inj & declaratory relief, by deft City of Hialeah.

• • •

NOV 10 80 MEMO in reply to deft's memo/opp to M/prel inj & declaratory relief, by pltf.

• • •

1989

JAN 31 112 ORDER (EPS 1/31/89) DENYING pltfs M/prel & perm inj and declaratory relief (EOD 2/3/89-CCAP).

• • •

APR 10 138 PRE-TRIAL Stip by pltfs & Deft City of Hialeah.

• • •

JUL 20 175 MINUTES on 7/20/89 of P/T Conf.

27 176 TRIAL BRIEF, by Deft.

31 177 PROPOSED FINDINGS of fact & conclusions Pltfs.

• • •

AUG 2 182 NOTICE of legal auth relied upon by Pltfs.

• • •

8 188 MEMO as to applic of first amendment's free Exercise & establishment clause, by Pltfs.

8 189 PROFFER of trl evidence, by Pltfs.

• • •

AUG 25 194 SUPPLEMENTAL MEMO on secular purposes of ordinance, by Deft.

• • •

OCT 05 204 FINAL JUDGMENT (EPS 10/5/89) FAVORING Deft agst Pltfs. Pltfs go henceforth with day. Each pty bear own costs & Attys fees. (EOD 10/6/89ccapM).

• • •

17 206 MOTION for new trl or amend findings & memo by Pltfs.

20 207 REPLY memo by Pltfs.

26 208 MOTION for new trl or amend findings of facts & Memo, by Pltfs.

27 209 MEMO in opp to M/new trl or amend findings & conclusions, by Deft City of Hialeah.

• • •

1990

JAN 25 213 TRANSCRIPT of Proceedings before Judge Spellman dated 7/31/89. Pgs 2-162.

25 214 TRANSCRIPT of Proceedings before Judge Spellman dated 8/2/89. Pgs 164-

342.

25 215 TRANSCRIPT of Proceedings before Judge Spellman dated 8/3/89. Pgs 344-523.

25 216 TRANSCRIPT of Proceedings before Judge Spellman dated 8/7/89. Pgs 525-711.

25 217 TRANSCRIPT of Proceedings before Judge Spellman dated 8/8/89. Pgs 713-922.

25 218 TRANSCRIPT of Proceedings before Judge Spellman dated 8/9/89. Pgs 924-1024.

25 219 TRANSCRIPT of Proceedings before Judge Spellman dated 8/11/89. Pgs 1026-1219.

25 220 TRANSCRIPT of Proceedings before Judge Spellman dated 8/14/89. Pgs 1221-1383.

25 221 TRANSCRIPT of Proceedings before Judge Spellman dated 8/15/89. Pgs 1385-1492.

24 222 ORDER (EPS-1/23/90) DENYING Pltfs' M/New Trl or to Amend Findings of Fact & Concls of Law (EOD-1/26/90-CCAP),

FEB 16 223 NOTICE OF APPEAL from F/J entered 10/05/89 and Order entered 01/24/90. Copies to USCA & Attys of Record. (FEE PAID #100745)

• • •

APR 13 --- RECORD ON APPEAL transmitted to USCA consisting of 7 vols of pldgs & 9 vols of transc. (USCA #90-5176).

• • •

MAY 2 226 TRANSCRIPT of proceedings on 8/28/89 pgs 1-124.

• • •

JUN 13 --- 1ST SUPPLEMENTAL ROA transm to USCA 1 accordian folder of exhs. 90-5176

26 --- ROA transmitted to USCA consisting of 1 vol exhs, (90-5176).

1991

SEP 4 228 MANDATE (USCA-8/30/91) AFFIRMING jdmt of Dist Court w/opinion (USCA #90-5176).

• • •

19 --- ROA received (vols. 1 thru 16); exhibits (1 envelope). (USCA #90-5176).

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

[case caption omitted in printing]

VERIFIED COMPLAINT

PRELIMINARY STATEMENT

1. This is a lawsuit brought by the Plaintiffs to enjoin, declare unconstitutional, and recover damages for deprivations of their First, Fourth, Fourteenth Amendment, and privacy rights by the City of Hialeah, its council, mayor and other officials. Defendants, their agents and employees have, under the color of state law, maliciously subjected Plaintiffs to illegal and unconstitutional harassment, threats, and discrimination, and have wilfully misused their official authority to interfere with the Plaintiffs' constitutionally protected right to establish and freely exercise their religion.

JURISDICTION

2. This action arises under the constitution and laws of the United States of America, particularly the First, Fourth and Fourteenth Amendments to the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. Section 1331, which provides for original jurisdiction of all civil actions arising under the Constitution and laws of the United States.

4. This Court also has jurisdiction under 28 U.S.C. Section 1343, which provides for jurisdiction of actions brought pursuant to 42 U.S.C. Section 1983 to redress the deprivation under the color of State law of any rights, privileges or immunities guaranteed by the Constitution and laws of the United States.

5. Plaintiffs' claims for declaratory and injunctive

relief and for damages are authorized by 28 U.S.C. Sections 2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure, and by 42 U.S.C. Section 1983.

PARTIES

6. Plaintiff, CHURCH OF THE LUKUMI BABALU AYE, INC. (hereinafter referred to as the church), is a not-for-profit corporation, duly organized and existing under the laws of the State of Florida. A stated corporate purpose, as contained in its articles, is to: maintain, own, operate, and have a place of religious worship according to spiritual teachings and writings of Lukumi, Ganga and Carabali; to hold seances and communicate with spirits in the cosmic universe, and; to promote and study supernatural phenomena. The church's membership is comprised of approximately three hundred persons who believe in and guide their religious lives based on the principles of the "Yoba" faith.

7. Plaintiff ERNESTO PICHARDO is the President of the Church. He holds the religious rank of Italero or "High Priest" and is a practicing member of the faith; overseeing masses, social services, cultural development and acting as a specialized master of major rituals.

8. The City of Hialeah is a municipal corporation duly constituted and existing pursuant to the laws of the State of Florida.

9. Silvio Cardoso, Salvatore D'Angelo, Herman Echevarria, Julio Martinez, Andres Mejides, Paulino Nunez, and Ray Robinson are all elected public officials of the City of Hialeah, and collectively these Defendants comprise the City of Hialeah Council; which is the legislative body for said municipality.

10. Raul Martinez is the elected mayor of the City of Hialeah and pursuant to its city charter, serves as its chief executive officer.

STATEMENT OF FACTS

11. "Santeria" (which is Spanish for the worship of saints), is a "generic misnomer" for traditional African religions which originated in the southwestern portion of the African continent now known as Nigeria. During the slave trade, these forms of worship survived in the new world through a process of syncretism with catholicism. The Yoba (Lukumi) religion is a pre-Christian faith which believes in one omnipotent known as "Olodumare the Creator" and his children, the "Orishas." Its central dogma "Ifa," is a written divinatory system consisting of religious mandates which govern the ethics, morals and theological principles by which the believers live and worship. Herbal medicine, prayer, protective charms, chants, magic, marriage and death rites, as well as food and animal offerings are all part of this religion. Said dogma also regulates all rituals and provides for a belief system which includes ordination into the priesthood for both men and women, dietary laws, religious taboos, etc. Priest hierarchical order is based on seniority of initiation and specialization through apprenticeship. The ritual offerings of specific animals, mostly chickens, constitutes an integral part of this religion. Animal offerings are made in association with the initiation of priests, for faith healing, and as a means of alternative therapy or crisis intervention. In all cases except for healing purposes, the animals are cleaned, cooked, and consumed by members of the church in a ritual feast. In cases of faith healing, the animals are not consumed because of the belief that the malady that has been exorcised from the individual now inhabits the animal. This religion believes that any animal which is offered must be healthy. The animals are ritualistically slaughtered only by specialized priests through the use of a sharp instrument to sever the carotid arteries, thereby causing simultaneous and instantaneous death. In Dade County alone, it is estimated that 50,000 people practice Santeria, primarily in

the privacy of their homes.

12. On or about June of 1987 the Church of the Lukumi acquired land situated at 173 West 5th Street, Hialeah, Florida, for the purpose of securing a religious place of worship, establishing a theological school, an Afro-Cuban museum, counseling services, a daycare center and to generally promote and advance its religious beliefs.

13. Immediately thereafter, under color of state law, the Defendants individually and together with their agents, assistants, employees and other persons acting in concert with them, and at their direction and control, interfered and chilled Plaintiffs and members of their class in the exercise of their religious rights under the United States Constitution. They did so through a concerted process of discouragement, harassment, threats, punishment, detention, and threats of prosecution, as witnessed by the following acts:

A) Causing a city council meeting to be held as to the issue of the propriety of granting the Church of the Lukumi a city-required "permit" to use the land as a place of worship (June 9, 1987).

B) Intrusion into religious services being conducted outside the church building, on its grounds, through the establishment of a highly visible police perimeter at the boundaries and entrance to the church property.

C) Refusing or failing to provide the church and its members with city sanitation services.

D) On or about May 21, 1987, intervening and causing Florida Power and Light to selectively discontinue providing electrical service to the church building.

E) Publicly inciting persons to appear at a public hearing of the city council for the purpose of present-

ing protests of the Santeria religion (June 9, 1987).

F) Causing members of the church and public who entered/exited the church to be detained by police without any reasonable basis of suspicion other than the act of ingress or egress to or from the church.

G) Unanimous adoption (on June 9, 1987) of Florida Statutes Chapter 828 (Cruelty to Animals) as an emergency city ordinance; notwithstanding the actual knowledge that said statute contains a religious exception therein; and against the advise from its attorney that the city did not have the authority to interpret the cruelty to animals statute to mean that sacrifice of animals is a violation thereof.

H) On the same date, unanimously passing a resolution specifically directed to the Church of the Lukumi, Ernesto Pichardo, members and believers (from the City of Hialeah) "... reiterating its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety."

I) Proposal and passage of yet another resolution aimed specifically at Plaintiffs and believers, declaring it the policy of the Defendants to oppose the ritual sacrifices of animals and declaring that any individual or organization that seeks to practice animal sacrifice "in violation of state and local laws" will be prosecuted (August 11, 1987).

J) Various and other acts intended to discriminate against Plaintiffs on the basis of their religious beliefs.

14. On September 8, 1987 the Defendant city council members, individually and collectively, under the color of state law, and with the intent to violate the Plaintiffs' constitutional rights, did conspire and propose three criminal ordinances as follows:

A. The first, prohibiting the possession of animals with the intent of committing religious slaughter or sacrifice (Exhibit 1).

B. The second, prohibiting the religious offering of animals and authorizing any Florida corporation "... for the prevention of cruelty to children or animals" to register agents with the city to be empowered to investigate and prosecute violations of the ordinance. Also, Section 7 of this proposed law repeals all ordinances in conflict therewith (Exhibit 2).

C. Thirdly, outlawing "animal slaughter" within Hialeah, except on premises "properly zoned" as a slaughterhouse and meeting city requirements for slaughter houses. This proposed ordinance also authorizes the appointment of agents-vigilantes not only with respect to the enforcement of the ordinance, but also regarding "... any other laws of the City of Hialeah, Florida for the purpose of protecting children or animals and preventing any act prohibited hereinunder." (Exhibit 3).

15. On September 15, 1987 the first ordinance became law in the City of Hialeah. The last two ordinances are currently undergoing revisions, the particulars of which are unknown to Plaintiffs, and are scheduled to be passed at the next council meeting scheduled for Tuesday, October 13, 1987.

16. The Church of the Lukumi Babalu Aye and Ernesto Pichardo have been injured because the Defendants have taken actions which unconstitutionally infringe on the Plaintiffs' rights to free exercise of religion and which discriminate against the Plaintiffs because of their religious beliefs and practices.

THE FIRST AMENDMENT COUNT I

The Plaintiffs reallege all of the foregoing allega-

tions as if fully set forth herein and would further state:

17. The policies, actions, and practices of the Defendants, their agents, and employees described above in this cause of action were willfully and maliciously designed to and had the effect of chilling, deterring, preventing, and inhibiting the Plaintiffs from the free exercise of their rights of religion, association, and assembly under the First Amendment of the Constitution of the United States and directly interfered with the exercise of those rights.

PRIVACY COUNT II

The Plaintiffs reallege all of the foregoing allegations as if fully set forth herein and would further state:

18. The policies, actions, and practices of the Defendants, their agents, and employees described above in this cause of action violated Plaintiffs' right to privacy under the Constitution of the United States.

THE FOURTEENTH AMENDMENT COUNT III

The Plaintiffs reallege all of the foregoing allegations as if fully set forth herein and would further state:

19. The policies, actions, and practices of the Defendants, their agents, and employees described above in this cause of action violated Plaintiffs' rights under the first, fourth, and fourteenth amendments to the Constitution of the United States.

EQUITABLE RELIEF COUNT IV

The Plaintiffs reallege all of the foregoing allegations as if fully set forth herein and would further state:

20. Plaintiffs have suffered, are suffering, and will

continue to suffer severe and irreparable injury by virtue of Defendants' acts, policies, and practices as set forth herein. Their fundamental constitutional rights have been violated and will continue to be violated. The acts of Defendants are chilling and deterring to the free exercise of rights of religion, association, assembly, privacy, and movement. Plaintiffs have no plain, adequate, or complete remedy at law to redress these violations of their constitutional rights, and this suit for injunction, declaratory judgment, and damages is their only means of securing complete and adequate relief. No other remedy would offer Plaintiffs substantial and complete protection from continuation of Defendants' unlawful and unconstitutional acts, policies, and practices.

21. Accordingly, unless and until the relief demanded in this complaint is granted, Plaintiffs have reason to believe that their rights to freedom of religion, freedom of association, freedom of inquiry and thought, due process of law, equal protection of the laws, and the right to privacy, as well as the other rights aforementioned, will continue to be infringed, threatened, impeded, and otherwise interfered with. The relief demanded is essential, not only to prevent the interference with Plaintiffs' constitutional rights on the part of the named Defendants, but to prevent interference by other state, county, or local officials, known and unknown. Therefore, unless the relief demanded is granted, Plaintiffs will suffer the most serious, immediate, and irreparable injury in that they will continue to be chilled, deterred, intimidated, hindered, and prevented from exercising fully and vigorously their most fundamental constitutional rights.

22. The enforcement of one or all of these ordinances will have the effect of punishing the Plaintiffs for the exercise of their rights, privileges, and immunities guaranteed to them by the Constitution and laws of the United States; will deter and prevent the Plaintiffs from the future exercise of these rights, privileges, and immu-

nities; and will continue to encourage Defendants and other state or local officials acting under color of law to engage in further acts of intimidation, harassment, threats, or other actions meant to deter and prevent the Plaintiffs from the exercise of their rights, privileges, and immunities.

23. Unless restrained by order of this court, Defendants or some of them or their agents or assistants will imminently prosecute Plaintiffs or cause them to be prosecuted under the aforementioned ordinance(s).

24. Permitting the Defendants to carry out their threatened actions will have destructive, harassing, intimidating and chilling effects on the federal rights described above.

25. Plaintiffs have no adequate remedy at law. The ominous deterrence to, and the prevention of the free exercise of their rights cannot be removed by successful defenses to criminal prosecutions.

26. The same chilling effect on the first amendment rights will result from the threats of action by the Defendants against the Plaintiffs even if these threats of prosecution ultimately fail. Every day that the threats are made, irreparable injury is being done to the Plaintiffs because they are deterred by fear of loss of liberty and property for practicing their religious beliefs fully, vigorously, and peacefully, pursuant to the Constitution and laws of the United States.

27. No injury will be sustained by the public or Defendants by the issuance of injunctive relief.

DAMAGES COUNT V

The Plaintiffs reallege all of the foregoing allegations as if fully set forth herein and would further state:

28. Plaintiffs have suffered, are suffering, and will

continue to suffer severe and irreparable injury and damage by virtue of Defendants' acts, policies, and practices as set forth herein. Their fundamental constitutional rights have been violated and will continue to be violated, and the acts of Defendants are chilling and deterring to the Plaintiffs' free exercise of their rights of religion, association, assembly, privacy, and movement, and effectively deprive them of their right to petition their city government for the redress of grievances.

PRAYER FOR RELIEF COUNT VI

WHEREFORE, Plaintiffs pray that this Honorable Court:

A) Assume jurisdiction of this cause.

B) Upon notice, issue a temporary restraining order; issue preliminary and permanent injunctions restraining and enjoining the Defendants and each of them, from further denying Plaintiffs the right to freely exercise their religious faith.

C) Enter a Judgment and Decree declaring that the policies, practices, and acts of Defendants denies the Plaintiffs their right to freely exercise their religion, as guaranteed by the first amendment of the Constitution of the United States as applied to the state by the fourteenth amendment; and that such policies, practice, and acts are, therefore, unconstitutional, illegal and void.

D) Issue a declaratory judgment, declaring that the actions of the Plaintiffs herein are protected by the Constitution of the United States.

E) Issue a declaratory judgment, declaring that the subject ordinance(s) are null and void on their face or as applied to the conduct of the Plaintiffs herein, as violative of the Constitution and laws of the United States.

F) Issue a declaratory judgment, declaring that

Florida Statutes, Chapter 828 is null and void as applied to the conduct of the Plaintiffs herein, as violative of the Constitution and laws of the United States, and as violative of the state religious exemption and pre-emption provision contained therein.

G) Order, adjudge, and decree that the Defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, be perpetually enjoined from any and all illegal acts of harassment directed toward the Plaintiffs by the Defendants.

H) Award damages unto the Plaintiffs together with their costs, reasonable attorneys fees and such further and other additional relief as may appear to the Court to be equitable and just.

JORGE A. DUARTE, ESQUIRE
Attorney for Plaintiffs

Co-Counsel:

Mitchell A. Horwich, Esquire
Horwich & Zager, P.A.

Maurice Rosen, Esquire

Stanley Pred, Esquire

Arthur B. Calvin, Esquire

[signature, addresses, and phone
numbers of counsel omitted in printing]

[case caption omitted in printing]

AFFIDAVIT

COMES NOW Ernesto Pichardo, who after being

duly sworn deposes and says:

1) I have read the allegations contained in the above styled complaint, and each and every allegation contained therein is true and correct to the best of my knowledge and belief.

ERNESTO PICHARDO

[jurat and signatures omitted in printing]

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

[case caption omitted in printing]

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, CITY OF HIALEAH, answers the Complaint and alleges:

1. Denies the allegations of paragraph 1 of the Complaint, except admits that the subject lawsuit was commenced by the Plaintiffs.
2. Denies the allegations of paragraph 2 of the Complaint as alleging a legal conclusion.
3. Admits the Court has jurisdiction under §1331 as alleged in paragraph 3 of the Complaint.
4. Admits the Court has jurisdiction over actions brought under 42 U.S.C. §1983, and denies all other allegations of that paragraph.
5. Denies the allegations of paragraph 5 of the Complaint as alleging a legal conclusion.
6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6 of the Complaint.
7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the Complaint.
8. Admits the allegations of paragraph 8 of the Complaint.
9. Admits the allegations of paragraph 9 of the Complaint.
10. Admits the allegations of paragraph 10 of the Complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the Complaint.

13. Denies the allegations of paragraph 13 of the Complaint, except admits adoption of Florida Statutes chapter 828 (cruelty to animals) as a city ordinance and the passage of certain resolutions on June 9, 1987 and August 11, 1987, and reference is made to those resolutions for the specific contents thereof.

14. Denies the allegations of paragraph 14 of the Complaint, except admits that on September 8, 1987 the city council members did propose three criminal ordinances, copies of which are attached to the Complaint and reference is made to those proposed ordinances for the specific contents thereof.

15. Admits the allegations of the first sentence of paragraph 15 of the Complaint, and denies the allegations of the second sentence of paragraph 15 of the Complaint, as pled.

16. Denies the allegations of paragraph 16 of the Complaint.

17. Denies the allegations of paragraph 17 of the Complaint.

18. Denies the allegations of paragraph 18 of the Complaint.

19. Denies the allegations of paragraph 19 of the Complaint.

20. Denies the allegations of paragraph 20 of the Complaint.

21. Denies the allegations of paragraph 21 of the

Complaint.

22. Denies the allegations of paragraph 22 of the Complaint.

23. Denies the allegations of paragraph 23 of the Complaint.

24. Denies the allegations of paragraph 24 of the Complaint.

25. Denies the allegations of paragraph 25 of the Complaint.

26. Denies the allegations of paragraph 26 of the Complaint.

27. Denies the allegations of paragraph 27 of the Complaint.

28. Denies the allegations of paragraph 28 of the Complaint.

FIRST DEFENSE

29. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

30. The claims alleged in the Complaint are barred by laches;

THIRD DEFENSE

31. The claims alleged in the Complaint are barred by the Doctrine of Unclean Hands.

FOURTH DEFENSE

32. The claims alleged in the Complaint are barred by establishment clause of the First Amendment and Fourteenth Amendment to the United States Constitution.

FIFTH DEFENSE

33. The claims alleged in the Complaint are not ripe for adjudication.

Respectfully submitted,
GREENBERG, TRAURIG,
ASKEW, HOFFMAN, LIPOFF,
ROSEN & QUENTAL, P.A.

BY: RICHARD G. GARRETT

STUART H. SINGER

[address, phone number, and signatures
of attorneys omitted in printing]

[certificate of service omitted in printing]

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 90-5176

D.C. Docket No. 87-1795-CIV-EPS

CHURCH OF THE LUKUMI BABALU AYE, INC., a
non-profit corporation and ERNESTO PICHARDO,

Plaintiffs-Appellants,

versus

CITY OF HIALEAH,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before FAY and COX, Circuit Judges and
HENDERSON, Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the
record from the United States District Court for the
Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now
hereby ordered and adjudged by this Court that the judg-
ment of the said District Court in this cause be and the
same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-
appellants pay to defendant-appellee, the costs on appeal
to be taxed by the Clerk of this Court.

Entered: June 11, 1991

For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: AUG 30 1991

MAY 22 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.,
and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that laws restricting religious exercise must be neutral and generally applicable. Is that rule violated by ordinances that forbid the killing of animals for ritual or sacrifice, but permit the killing of animals for a wide variety of secular reasons?

2. What must the City prove to show a compelling interest sufficient to justify a law that discriminates against religion in violation of *Employment Division v. Smith*? In particular:

a. Must the compelling interest justify the discrimination, or is it sufficient to have an interest that would justify a nondiscriminatory general prohibition?

b. Must the compelling interest be of extraordinary importance, or is any legitimate interest within the police power sufficient?

c. Must the compelling interest be based on actual harms, or is it sufficient to identify risks and challenge worshipers to prove that the risks can never come to fruition?

PARTIES TO THE PROCEEDING

All parties are named in the caption of the case. The Church of the Lukumi Babalu Aye, Inc. has no parent corporations or subsidiaries.

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City of Hialeah Resolution 87-66	1, 3, 6, 15
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Other Authorities

Bastide, Roger, African Civilisations in the New World (Peter Green trans., 1971)	2
Bleich, J. David, Contemporary Halakhic Problems (1977)	17

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Mircea Eliade, Encyclopedia of Religion (1987)	16, 19
Fla. Atty. Gen'l Opinion 87-56 (1987)	21
Fla. Atty. Gen'l Opinion 90-29 (1990)	22
Glasse, Cyril, The Concise Encyclopaedia of Islam (1989)	16
Laycock, "Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights," 99 Yale L.J. 1711 (1990)	34
Melton, J. Gordon, Encyclopedia of American Religions (3d ed. 1989)	19
Rahner, Karl, Encyclopedia of Theology (1975)	17
Webster's Third New Int'l Dictionary of the English Language Unabridged (1981)	16

OPINIONS BELOW

The opinion of the district court (Pet.App. A3) is reported at 723 F.Supp. 1467 (S.D. Fla. 1989). The opinion and orders of the court of appeals (Pet.App. A1, A50, J.A. 22) are unreported.¹

JURISDICTION

The court of appeals entered judgment on June 11, 1991, and denied a timely petition for rehearing on August 21, 1991. The petition for *certiorari* was filed November 19, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

This case involves the validity of Ordinances 87-40, 87-52, 87-71, and 87-72 of the City of Hialeah, Florida. Ord. 87-40 adopts by reference Fla. Stat. Ann. ch. 828. Of the provisions incorporated from chapter 828, petitioners challenge only one provision of § 828.12.

Petitioners do not challenge the provisions on humane slaughter in Fla. Stat. Ann. §§ 828.22, 828.23, and 828.24 (1976 & Supp. 1992), or the prohibitions on torment and torture of animals in § 828.12 (Supp. 1992), all of which are incorporated into Ord. 87-40.

The disputed portions of the ordinances, relevant portions of two accompanying resolutions, and the unchallenged Florida laws on humane slaughter are set out

¹ The Joint Appendix is cited J.A.; the Appendix to the Petition for Writ of *Certiorari* is cited Pet.App.; the Appendix to this brief is cited Br.App. Citations to the record in the district court are by volume and page number; e.g., R10-392 indicates Record volume 10 at page 392.

in the Appendix to this brief.² The case arises under the Free Exercise Clause, U.S. Const., amend. I, and 42 U.S.C. §1983 (1988), and these provisions are set out at Pet.App. A58.

STATEMENT OF THE CASE

This is a suit to enjoin enforcement of four ordinances enacted to prevent the practice of petitioners' religion in the City of Hialeah. These ordinances forbid the killing of animals for purposes of ritual or sacrifice. In contrast, the City and the State of Florida permit the killing of animals for any plausible secular purpose.

The district court upheld each of the ordinances against petitioners' free exercise challenge. The court of appeals accepted the district court's findings of fact and affirmed its judgment "for the reasons set forth in Parts A, B, C(1) and C(3) of the 'Conclusions of Law' in the district court's memorandum opinion." Pet.App. A2. Thus, except for Part C(2) of the opinion, the reasoning of the district court is also the reasoning of the court of appeals.

Petitioners are the Church of the Lukumi Babalu Aye, Inc., and Ernesto Pichardo, one of the priests of the Church. The Church and its members practice an ancient African religion variously known as Yoba, Yoruba, or Santeria. *Id.* at A4. Yoruba originated some four thousand years ago. *Id.* at A5. It came to the Caribbean with slavery, *id.*, and to the United States with refugees from the Cuban revolution, *id.* at A6. Santeria and Lukumi are Cuban names for the religion. Roger Bastide, *African Civilisations in the New World* 115 (Peter Green trans. 1971).

² These provisions also appear in Pet.App., but that printing contains minor errors in the preamble to Ord. 87-72 and in the text of §828.12.

There are fifty to sixty thousand adherents of Santeria in South Florida, and an unknown number of adherents to other religions that practice animal sacrifice. Pet.App. A6. There may be a hundred million Santeria believers worldwide. R10-392.

An integral part of Santeria is the sacrifice of chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles. Pet.App. A9. These animals are sacrificed for birth, marriage, and death rites, for the cure of the sick, for the initiation of new members or priests, and for an annual celebration. R11-626, R12-810. The faith could not survive without animal sacrifice, because sacrifice is essential to the initiation of new priests. R12-862. Most of the animals are cooked and eaten in a ritual feast following the sacrifice. Pet.App. A9, R15-1249. But if the animal is sacrificed on the occasion of death or sickness, the sickness is believed to have passed into the animal, and the animal is not eaten. Pet.App. A9 & n.11, A16-A17 & n.26.

Because of persistent hostility and discrimination, Santeria has remained underground in Cuba and the United States. *Id.* at A5-A7. This case was precipitated when petitioners leased a vacant used car lot and announced plans to open a church. The City responded with three resolutions and four overlapping ordinances prohibiting the religious sacrifice of animals. Br.App. A1-A5. These ordinances were enacted "in a mob atmosphere." Pet.App. A27. Angry speakers denounced the Church and misstated its practices. One speaker said that if the Council permitted the Church to worship, the country would "regress into paganism." Pl.Ex. 10 at 4, R8 at 81-82. Another said "the city would not please God." Pl.Ex. 10 at 5. Councilman Martinez argued that if the religion was "not permitted in Cuba, why bring it to the United States?" *Id.* at 6.

The ordinances are carefully drafted to prohibit religious sacrifice but not to interfere with secular reasons

for killing animals. Ordinances 87-52 and 87-71 forbid "sacrifice," which they define as follows: "to unnecessarily kill . . . an animal in a ritual or ceremony not for the primary purpose of food consumption." Br.App. A1-A3. Ord. 87-40 forbids "unnecessary" killings of animals; the City claims that sacrifice is unnecessary. Br.App. A1, A5. Ord. 87-72 confines slaughter to slaughterhouses. Br.App. A3-A4. This ordinance applies to petitioners only on the theory, rejected in Ordinances 87-52 and 87-71, that petitioners are engaged in slaughter. Ordinances 87-52, 87-71, and 87-72 draw distinctions based on the primary and secondary reasons for killing an animal; these distinctions gerrymander the reasons for killing animals so that only religious sacrifice is forbidden. Br.App. A1-A4. This brief will develop the basic principles applicable to the case before attempting detailed textual analysis of these ordinances.

Following a nine-day bench trial, the district court found that the ordinances were intended to prevent religious sacrifice of animals, Pet.App. A28, that the ordinances burden petitioners' religion, *id.* at A42, and that "the ordinances are not religiously neutral," *id.* at A23. But it concluded that the City is not required to treat religion with neutrality. *Id.* at A40.

The district court went on to hold that the ordinances are justified by several compelling interests. In reaching this conclusion, the court equated compelling interest with any legitimate public policy. *Id.* at A44-A45.

First, the district court held that the City had a compelling interest in protecting animals. In Santeria rituals, the animals are sacrificed by cutting the carotid arteries. *Id.* at A12. Cutting the carotid arteries is the method prescribed as humane by Florida and federal law. Fla. Stat. Ann. §828.23(7)(b)(1976)(Br.App. A7); 7 U.S.C. §1902(b)(1988). But the district court found that "there is no guarantee that a person performing the sacrifice in

the manner described can cut through both carotid arteries at the same time." Pet.App. A13. Because of this and related uncertainties, the district court found that not all sacrificed animals would die instantly. *Id.* at A13-A14, A45. It also found that the animals experience fear before the sacrifice, *id.* at A14, A45, and that petitioners could not guarantee that persons not party to the litigation would care for animals humanely before sacrifice, *id.* at A46 & n.58.

Second, the district court found two risks to health, one public and one private. The public health risk was that some unidentified practitioners of animal sacrifice sometimes dispose of carcasses in public places. *Id.* at A43. However, the district court found that there "have been no instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18. The private health risk was that worshipers often eat the uninspected meat of sacrificed animals. *Id.* at A43-A44. But the City presented no evidence that anyone had ever become ill from eating this meat.

Third, the district court found a compelling interest in preventing animal sacrifice in areas "not zoned for slaughterhouse use." *Id.* at A45. The court did not explain what this interest was or why it was compelling. The used car lot that petitioners selected for their church was zoned for churches. *Id.* at A24 n.41. Moreover, parts of the city are rural, and there are farms within the city limits. R10-458, R15-1332.

The district court entered judgment before the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990); the appeal was briefed and argued after *Smith*. Petitioners argued in the court of appeals that the ordinances violated *Smith* because they were neither neutral nor generally applicable. The City conceded that "neither the State of Florida nor the City of Hialeah has enacted a generally applicable ban on the killing of ani-

mals." Br. of Appellee in Ct.App. 21. Even so, the court of appeals found it unnecessary to "decide the effect of *Smith*." Pet.App. A2 n.1. Rather, it held that the ordinances were justified by compelling interests even if they violated *Smith*. The court of appeals relied on the district court's opinion with respect to three compelling interests -- harm to animals, health risks, and zoning.³

SUMMARY OF ARGUMENT

Government cannot regulate religion, except as the incidental effect of neutral and generally applicable laws, or to serve a compelling interest by the least restrictive means. Laws are subject to the compelling interest test if they overtly discriminate against religion, if they are enacted because of an anti-religious motive, or if their anti-religious effect is exclusive or dominant instead of merely incidental. *Employment Division v. Smith*, 494 U.S. 872.

The ordinances in this case were directed against a religious practice. The preambles and accompanying resolutions recite, and the trial court found, Pet.App. A28, that these ordinances were enacted for the express purpose of suppressing the religious ritual of animal sacrifice. The ordinances were enacted "in a mob atmosphere," *id.* at A27, in response to petitioners' announced plans to open a church and worship in public, *id.* at A28.

By expressly prohibiting "sacrifice" and "ritual" killings of animals, by the theological judgment that animal sacrifice is "unnecessary," and by religious gerrymanders based on primary and secondary purposes for killing animals, these ordinances forbid the killing of animals for

³ The district court also held that children attending the sacrifices might suffer psychological damage. Pet.App. A44. This holding was contained in the one part of the opinion (C(2)) on which the court of appeals expressly disclaimed any reliance. Pet.App. A2.

religious purposes without forbidding the killing of animals for any plausible secular purposes. State and local law permit animals to be killed for food, sport, medical research, and many reasons of human convenience.

This discrimination is not justified by any compelling interest. A compelling interest in discriminating against religion must justify the discrimination, because the alleged interest must fit the enacted ordinance. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501 (1991). The interest must be of the highest order, and the City must prove actual harms that it has a compelling interest in preventing. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972), reaffirmed in *Smith*.

The alleged interests in this case fall far short of these standards. In analogous secular contexts, the City either does not pursue its asserted interests at all, or it pursues them to a lesser degree and by less restrictive means. None of the City's interests is sufficiently important to be compelling, and most of them are speculative and unproven. The courts below did not require the City to prove actual harm to an interest of the highest order; instead, they repeatedly required petitioners to "guarantee" that no harm could ever come of anything connected with animal sacrifice. See, e.g., Pet.App. A13.

The factual testimony of the City's experts does not support a legal conclusion of compelling interest. Those experts testified that sacrificed animals become unconscious "very rapidly" when sacrifice is performed as intended, and within "seconds to minutes" even when a mistake is made. R12-891. Hunting and trapping and many other activities inflict greater pain than sacrifice. The public health officer testified that sacrificed animals can be safely disposed of in a plastic bag and a garbage can, R11-555, and that the problem of sacrificed animals is a very small part of the general problem of organic

garbage.

The ordinances cannot be justified as zoning laws. Because there is no neutral and generally applicable law against the killing of animals, petitioners' sacrifice is a constitutionally protected activity. A constitutionally protected activity cannot be entirely excluded from the City through exclusionary zoning. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The courts below upheld these ordinances because they misunderstood two legal principles. They did not believe that government must be neutral toward religion. Pet.App. A40. And they assumed that any "valid exercise of the police power" is a compelling interest. *Id.* at A44-A45.

ARGUMENT

I. THE ORDINANCES DISCRIMINATE AGAINST RELIGION

Concurring separately in *Employment Division v. Smith*, Justice O'Connor said that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." 494 U.S. at 894. But that is exactly what Hialeah has done here. This case began when petitioners announced their intention to open a church and worship in public. The City responded with ordinances designed to suppress religious sacrifice of animals without inconveniencing any other resident of Hialeah.

These ordinances forbid the religious sacrifice of animals; they do not forbid the killing of animals for food, for recreation, or for human convenience. These secular killings are not merely permitted; they are often expressly authorized and affirmatively encouraged. What Hialeah's ordinances prohibit is killing an animal for "sacrifice" in a "ritual or ceremony."

All the issues in this case flow from this distinction between sacrificial and nonsacrificial killings of animals. The four overlapping, repetitive, and gerrymandered ordinances, and the after-the-fact rationalizations based on alleged compelling interests that the City does not pursue in any other contexts, are all attempts to disguise this central distinction in a way that might escape judicial scrutiny.

A. Laws That Burden Religious Exercise Must Be Neutral And Generally Applicable

Employment Division v. Smith holds that a "neutral, generally applicable regulatory law" may be applied to religiously motivated conduct without compelling justification. 494 U.S. at 880. But *Smith* gives new emphasis to the requirement that laws restricting religion be neutral and generally applicable. That requirement is now the principal constitutional protection for free exercise of religion. It is of great importance for this Court to give meaningful content to that protection.

Neither of the courts below considered the implications of *Smith*. The district court could not do so, because *Smith* had not yet been decided. The court of appeals refused to do so, holding that it could decide this case without deciding the effect of *Smith*. Pet.App. A2 n.1. The court of appeals relied on the district court's belief, erroneous even before *Smith*, that government has no obligation to treat religion neutrally. *Id.* at A40.

In at least three formulations, each approaching the problem from a slightly different perspective, this Court in *Smith* insisted on neutrality and general applicability. First, *Smith* says a law is unconstitutional if it singles out religion for special regulation:

a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are en-

gaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes."

494 U.S. at 877-78. The Court's hypothetical is this case: these ordinances expressly and uniquely forbid the killing of animals for worship purposes.

Second, a law is subject to stringent review under *Smith* if it is "specifically directed at [a litigant's] religious practice." *Id.* The Court elaborated on this point in a tax example, which it treated as equivalent to regulation:

if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Id. at 878 (emphasis added). This requirement of merely incidental effect has two implications: the purpose or "object" of the law cannot be anti-religious, and the dominant effect cannot be anti-religious. The Hialeah ordinances fail both of these standards. The City's purpose was clear, and suppression of religion is virtually the only effect of the ordinances.

Third, *Smith* says that if the legality of a regulated act depends upon the actor's motives, religious motives must be included among the motives that are legally permitted. *Id.* at 884. This was the Court's rationale for reaffirming the line of unemployment-compensation cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963).⁴

⁴ *Accord*, *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981).

The states in those cases had accepted some reasons for quitting employment, but had refused to accept religious reasons. In *Smith*, the Court said that the unemployment compensation cases

stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

494 U.S. at 884. Secular reasons for killing animals are exempt from, or simply outside the scope of, Hialeah's ordinances. But Hialeah has not extended the same treatment to religious reasons for killing animals.

The three formulations in *Smith* are mutually reinforcing elements of the requirement that government be neutral toward religion. A law is invalid if it overtly discriminates against religion, if it is enacted for anti-religious motives, if it exempts secular conduct but not religious conduct, if it treats religious reasons for acting less favorably than secular reasons for acting, or if its dominant effect (and not merely an incidental effect) is to suppress religious exercise.

B. These Ordinances Are Neither Neutral Nor Generally Applicable

The ordinances challenged in this case fail each of these tests. Two of the ordinances overtly discriminate against religion. All of them were enacted for the sole purpose of suppressing a religious practice, and that is almost their only effect. All of them recognize good and bad reasons for killing animals, and classify religious reasons as bad. They are not in any sense religiously neutral or generally applicable.

1. The Discriminatory Pattern Common To All The Ordinances

a. **Discrimination Against Religious Reasons For Killing Animals.** To implement its discriminatory purposes, the City created three statutory categories of killings of animals: to "sacrifice," meaning a killing for ritual; to "slaughter," meaning a killing for food consumption; and by implication, all other killings of animals.³ Sacrifice is absolutely forbidden. Ord. 87-71 §3 (Br.App. A3). Slaughter is confined to properly zoned slaughterhouses, Ord. 87-72 §3 (Br.App. A3), to small producers of beef and pork, *id.* §6 (Br.App. A4), or to other licensed establishments, Ord. 87-52, Hialeah Code §6-9 ¶3 (Br.App. A2). Killings that are neither for food nor for sacrifice are regulated only by Ord. 87-40 (Br. App. A1), which incorporates pre-existing state law.

Neither the State of Florida nor the City of Hialeah has enacted anything remotely approaching a generally applicable ban on the killing of animals. The laws of Florida and of Hialeah provide for slaughterhouses and the killing of animals for food, and meat is sold in Hialeah. See, e.g., Fla. Stat. Ann. §§828.22 to 828.26 (1976 & Supp. 1992)(excerpted at Br.App. A6-A7), incorporated in Ord. 87-40.

Hunting, fishing, and trapping in Florida are recreations of constitutional status, Fla. Const. art. 4 §9, beyond the power of municipal regulation. *Bell v. Vaughn*, 21 So.2d 31 (Fla. 1945). The right to hunt on private land is a property right protected by the takings clause. *Alford v. Finch*, 155 So.2d 790, 793 (Fla. 1963). It is lawful to fish in Hialeah, and it is lawful for residents of Hialeah to go hunting and trapping and return with their kill. It is *unlawful* to help animals escape from hunters.

³ See the definitions in Ordinances 87-52, 87-71, and 87-72 (Br.App. A1-A3).

Fla. Stat. Ann. §372.705 (Supp. 1992).

Public officials and humane societies may kill "injured, sick, or abandoned" or "diseased" domestic animals. Fla. Stat. Ann. §§828.05, 828.055 (Supp. 1992), incorporated in Ord. 87-40. Public or private animal shelters and similar facilities may kill "stray, neglected, abandoned, or unwanted animals." *Id.* §828.058, incorporated in Ord. 87-40. Animals judicially removed from their owners may be killed "for humanitarian reasons" or if the animal "is of no commercial value." *Id.* §828.073(4)(c)2, incorporated in Ord. 87-40. Animals may be killed or subjected to pain and suffering "in the interest of medical science." *Id.* §828.02 (1976), incorporated in Ord. 87-40. It is lawful to exterminate any animal that is "undesirable," *id.* §482.021(17)(1991), expressly including birds and mammals, §482.021(15)(c)(1991). Property owners may put out poison in their yards and enclosures, *id.* §828.08 (1976), incorporated in Ord. 87-40. Hialeah has not interfered with the sale of lobsters to be boiled alive, R15-1336, and the record does not show that it has interfered with the practice of feeding live rats to pet snakes.

In short, there are many reasons for killing animals, and nearly all of them are acceptable to the City. Animals may be killed for food or for sport, because they are sick or injured, or merely because they are "stray," "unwanted," "undesirable" or "of no commercial value." Any resident of Hialeah can kill an unwanted pet in his yard or in his home, so long as he does not do so in a ritual or ceremony. Petitioners have found no reported prosecution in Florida for an unaggravated killing, as distinguished from torture or cruelty to a living animal.

Religious faith is an unacceptable reason for killing animals -- almost the only unacceptable reason. This is rank discrimination against religion. If the City recognizes that there are acceptable reasons for killing animals, then it must classify religion among those accepta-

ble reasons. This is the lesson of *Smith* and of the unemployment compensation cases as reinterpreted in *Smith*. 494 U.S. at 877-78, 884.

The courts below erred because they misunderstood this fundamental point. The court of appeals relied on the district court's conclusion that the ordinances were valid "even if the use of the words 'ritual' and 'ceremony' are understood as targeting primarily religious conduct." Pet.App. A40. The district court thought that government could target religion because "[s]trict religious neutrality is not required." *Id.* The district court supported this proposition by citing Establishment Clause cases, including a summary affirmance upholding a federal statute that *exempts* ritual slaughter from restrictive regulation. *Id.*, citing *Jones v. Butz*, 374 F.Supp. 1284 (S.D. N.Y.), *aff'd mem.*, 419 U.S. 806 (1974). But none of the cases cited upheld a discriminatory *restriction* on religious exercise. The courts below ignored the settled distinction between religious exemptions and religious restrictions. This Court has repeatedly held that legislatures may exempt religion from regulation. *Smith*, 494 U.S. at 890; *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). But legislatures may not regulate religion except as an incidental application of neutral and generally applicable law. *Smith*, 494 U.S. at 877-78.

Hialeah has not enacted a neutral and generally applicable law. Because these ordinances discriminate against religious reasons for killing animals, they must be justified by a compelling interest.

b. The Purpose To Suppress Religion. The record is clear that the purpose of Hialeah's ordinances was not neutral toward religion. To the contrary, the district court found that these ordinances were "prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals," and that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it

was practiced by." Pet.App. A28. The City openly declared in resolutions and preambles that its target was "certain religions" (Resolution 87-66, Br.App. A4), and that its policy was to oppose "public-ritualistic animal sacrifices" and similar formulations. See Resolution 87-90 (Br.App. A4-A5), and the preambles to ordinances 87-40, 87-52, and 87-71 (Br.App. A1-A2).

In the language of *Smith*, these ordinances were "specifically directed" to religious conduct; suppression of worship services was the "object," and not merely "the incidental effect." 494 U.S. at 878. The City claims that the ordinances are neutral *among* religions, because they forbid all religious sacrifice of animals. But they are not neutral *toward* religion. Their purpose was to suppress petitioners' religion and any similar religions in the City.⁶

2. The Text Of The Ordinances

In this section, we review the text of the individual ordinances, show how each singles out religious sacrifice for discriminatory treatment, and further develop the basic principle of religious neutrality.

a. Ord. 87-71. Ord. 87-71 provides:

Section 1. For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

....

Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate

⁶ Even the claim of neutrality *among* religions is doubtful. An implicit exemption for Kosher slaughter is discussed *infra* at 24.

limits of the City of Hialeah, Florida.

Because this ordinance singles out religious conduct for separate prohibition, it is unconstitutional unless justified by a compelling interest. Unconstitutionality is revealed by three terms of the ordinance: "sacrifice," "ritual or ceremony," and "unnecessarily."

The reference to "torment, torture, and mutilation" is not at issue, because these acts are neither necessary nor sufficient to a violation. Killing in a ritual or ceremony is a forbidden sacrifice even if done humanely; torment, torture, and mutilation are not forbidden by this ordinance unless they occur in a ritual or ceremony. In any event, torment, torture, and mutilation are already forbidden in neutral terms by Fla. Stat. Ann. §828.12, incorporated in Ord. 87-40, and petitioners do not challenge that prohibition. The only reason for Ord. 87-71 is to forbid killing of animals in a "ritual or ceremony not for the primary purpose of food consumption."

i. **"Sacrifice."** Only sacrifice is an offense, and sacrifice is an explicitly religious practice. "Sacrifice" is from the same Latin root as "sacred" and "sacrament;" its original and still primary meaning is an offering "to a deity." *Webster's Third New Int'l Dictionary of the English Language Unabridged* 1996 (1981). Animal sacrifice is one of the oldest and most widespread religious practices. See Joseph Henninger, *Sacrifice*, in 12 *Mircea Eliade, Encyclopedia of Religion* 544, 554-55 (1987).

Animal sacrifice remains important in modern Islam. The Feast of Sacrifice, Id-Ul-Adha, culminates the pilgrimage to Mecca, and is also celebrated with sacrifices in the homes of observant Muslims who are not on pilgrimage. Cyril Glasse, *The Concise Encyclopaedia of Islam* 178 (1989). Muslims may also sacrifice an animal when a child is born, or "at any time with the intention of coming closer to God." *Id.* at 340.

Animal sacrifice was central to the Jewish scriptures

and to Jewish ritual practice. See, e.g., Genesis 4:2-5 (Cain and Abel), Exodus 12:3-10 (Passover), Leviticus 1-7 (rules for ritual sacrifice), Luke 2:24 (sacrifice by Mary and Joseph). Because Jewish sacrifice was centralized at the Temple in Jerusalem, it ended abruptly when the Romans destroyed the Temple. Orthodox Jews now debate whether sacrifice should be resumed on the recaptured Temple site, or only when the Temple itself is reconstructed. 1 J. David Bleich, *Contemporary Halakhic Problems* 244-69 (1977).

Christians dispensed with animal sacrifice because they believe that Christ's sacrifice on the cross is good for all time and all people. Hebrews 7:27, 8:12-14. A speaker at the city council meeting supported the ordinances on this ground. Pl.Ex. 10 at 5, R8 at 81-82. Christianity remains rich in the symbolism and theology of sacrifice. Christ is described as "the Lamb of God," John 1:29, Revelation 7:14-17, and Holy Communion is a periodic re-enactment of His sacrifice. Johannes Betz, *Eucharist*, in Karl Rahner, ed., *Encyclopedia of Theology* 447, 456 (1975); Otto Semmelroth, *Sacrifice*, in *id.* 1488, 1494-95.

Ord. 87-71 expressly forbids a religious ritual and nothing else. Such a prohibition is unconstitutional unless justified by a compelling interest.

ii. **"Ritual Or Ceremony."** The ordinance defines sacrifice as unnecessarily killing an animal in a "ritual or ceremony not for the primary purpose of food consumption." Ritual or ceremony is the essence of the offense. "Ritual" is also a religion-laden term; to prohibit ritual is to prohibit religion.

The courts below suggested that the ordinance is not limited to *religious* rituals. Pet.App. A40. The ordinance would also forbid the killing of animals in secular rituals, if any such rituals were ever found in Hialeah. There are multiple errors in this reasoning. If an ordinance so

directly targeted at religion can be saved by hypothetical secular applications, then no religion is protected. A city seeking to forbid the Catholic Mass and the Protestant Communion service would simply have to track the drafting technique of Ord. 87-71:

For the purposes of this Ordinance, to take communion means: to unnecessarily consume wine or grape juice in a ritual or ceremony not for the primary purpose of refreshment or intoxication. It shall be unlawful to take communion within the corporate limits of the City.

By the lower courts' reasoning, such a law forbidding Communion would raise no issue under the Free Exercise Clause, because it might also apply to secular rituals.

Besides, there was no evidence that animals are killed in secular rituals in Hialeah. The trial judge recognized that the ordinances have no secular applications when he refused to make an exception for Santeria: "Any contemplated exception would have to cover all religions. The exception would, in effect, swallow the rule." Pet.App. A47. The reason a religious exception would swallow the rule is that the rule has only religious applications.

The City's efforts to imagine potential secular applications of the ordinance have not been successful. The City has suggested voodoo rituals, satanic rituals, and cockfights. Op. Cert. at 8. Each of these applications is disputed, but the testimony left these disputes relatively undeveloped.⁷ Even if the City were correct about all

⁷ The ordinances at issue do not appear to forbid cockfighting, because the birds are not killed for food and a cockfight is not a ritual or ceremony. Cockfighting is illegal in Florida but common in Hialeah. (continued...)

three, the ordinances would not be generally applicable. They would not even come close.

Petitioners claim that these ordinances single out a despised minority religion for special restrictions. The City responds that the ordinances might also apply to two other groups who are even more despised and whose religious status is disputed, and to a disreputable recreation that has long been illegal under other laws. Hialeah does not satisfy its obligation of neutrality by treating religious reasons like the worst-treated, least-approved secular reasons. Rather, because religious exercise is a constitutional right, Hialeah must treat religious reasons as well as it treats the most valued and acceptable secular reasons.

Hialeah's claim of arguably secular applications wholly misunderstands the logic of *Smith*. *Smith* assumes that if religion is subject only to generally applicable

⁷ (...continued)

ah, and enforcement is sporadic. R8 at 126-27, R10 at 453-69.

Expert witnesses for both sides referred to voodoo as a religion, R9 at 283, 300, R14 at 1070, 1078, and the trial court assumed that voodoo is a religion, Pet.App. A6. The City's witness Mark Paulhus described satanism in religious terms, R14 at 1073-76, but the trial court assumed that satanic cults "would probably not enjoy First Amendment protection," Pet.App. A40. Groups that call themselves satanic can be radically different from each other; some sacrifice animals and some do not, and from summary accounts, some appear to be religious and some do not. See J. Gordon Melton, *Encyclopedia of American Religions* 145-46 (3d ed. 1989). Mr. Paulhus had seen no evidence of satanism in South Florida, R14-1073, and no issue is presented concerning either voodoo or satanism.

Both voodoo and satanism are quite distinct from Santeria. See Melton at 143; Joseph Murphy, *Santeria*, in 13 *Eliade, Encyclopedia of Religion* 66-67; George Simpson, *Afro-Caribbean Religions*, in 3 *id.* at 90-92. Mr. Paulhus acknowledged that voodoo and Santeria had evolved separately, although he emphasized the similarity that both blend elements of African religion with elements of Christianity. R14 at 1078-79.

laws, then religious minorities will be protected by the political process. Legislatures can impose on religious minorities only those laws they are willing to impose on all their constituents. Justice Jackson set forth the essential point a generation ago:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949)(concurring), quoted with approval by the Court, *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972). If Hialeah applied its rules against killing animals to hunters, fishers, farmers, pet owners, veterinarians, and exterminators, to say nothing of the meat industry and meat eaters, one suspects that the political retribution would be overpowering. But there is no such guarantee of political protection in a claim that a law applies to two or three small and unpopular minorities instead of one. Such a law is *not* generally applicable.

If facial neutrality is to be an important threshold inquiry in free exercise cases, judges must not be diverted by euphemisms and circumlocutions. A prohibition on "sacrifice," which is triggered only when otherwise permissible conduct occurs in a "ritual or ceremony," prohibits the free exercise of religion. Any such prohibition must be justified by a compelling interest.

iii. "Unnecessarily." Under Ord. 87-71, a

killing is a forbidden sacrifice only when an animal is "unnecessarily" killed in a ritual or ceremony. Lack of necessity is an element of the offense; Hialeah can never prove a violation of Ord. 87-71 without proving that the sacrifice was unnecessary. But as discussed immediately below, the necessity of sacrifice is a theological judgment that no governmental unit can make.

b. **Ord. 87-40.** Ord. 87-40 merely enacts Fla. Stat. Ann. ch. 828 as a city ordinance. The City claims that the italicized part of §828.12 (as it read in 1987) forbids animal sacrifice:

*Whoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, shall be guilty of a misdemeanor of the first degree, punishable by as provided in §775.082 or by a fine of not more than \$5,000, or both.*⁸

The City contends that religious sacrifice of animals is unnecessary, and therefore unlawful. The City obtained an opinion of the Florida Attorney General to this effect. Fla. Atty. Gen'l Opinion 87-56, Annual Report at 146, 149 (1987). He appears to define unnecessary as "without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful." *Id.* n.11. But neither Hialeah nor the Attorney General has power to decide that religious worship is unnecessary, or to render

⁸ The state enacted minor amendments to §828.12 in 1989, but these were not incorporated into the Hialeah ordinance enacted in 1987. Both versions of §828.12 are set out at Be.App. A5-A6.

theological judgment on what rituals are necessary to worship, or to decree which forms of worship are "beneficial or useful." Neither can take sides "in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877; accord, *United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

To decide that an act of worship is unnecessary is obviously not religiously neutral. A standard of lack of necessity cannot be applied to religion in a neutral way. From the perspective of the believer, religious acts are always necessary, and the religious judgment controls. Any attempt to question the necessity of animal sacrifice raises an issue of religious doctrine, and even when attempting to apply neutral principles of secular law, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Jones v. Wolf*, 443 U.S. 595, 604 (1979); accord, *Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696, 708-20 (1976). If the City recognizes some killings of animals as necessary, then it must recognize religious killings of animals as necessary.

Even if it were theoretically possible to apply a necessity standard to religion in a nondiscriminatory way, Hialeah has not done so. City and state law obviously assume that it is "necessary" to kill fish and game animals for recreation, that it is "necessary" to kill unwanted pets for human convenience, and so on across a vast range of secular reasons for killing animals. Petitioners have found no successful prosecution in Florida for the "unnecessary" killing of an animal. The only reported case holds that the use of live rabbits to train greyhounds is *not* unnecessary killing or torment. *Kiper v. State*, 310 So.2d 42 (Fla.App. 1975).⁹

⁹ But cf. Fla. Atty. Gen'l Opinion 90-29 (1990), expressing the view that killing animals and using the carcasses to train greyhounds vio-

(continued...)

Because the City's interpretation of the necessity standard discriminates against religion, and because the necessity standard cannot be applied to religion at all, ordinances 87-40 and 87-71 are unconstitutional unless their application to religion is justified by a compelling interest.

c. **Ord. 87-52.** Ord. 87-52 is convoluted, but the bottom line is the same. Ord. 87-52 added §§6-8 and 6-9 to the City Code. Section 6-9 reads as follows:

Section 6-9. Prohibition Against Possession Of Animals for Slaughter Or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food

⁹ (...continued)

lates the law against "unnecessary" killings, because this practice "is outside the usual course of business for this industry." This opinion appears to be inconsistent with *Kiper*. In any event, its rationale is inapplicable to petitioners, because animal sacrifice is central to "the usual course" of their religion. The practice of using live rabbits to train greyhounds is now forbidden by a separate statutory provision, in which necessity is not an element of the offense. Fla. Stat. Ann. §828.122(2)(a), (3)(a)(Supp. 1992).

purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

i. **Paragraph 1.** The interaction of paragraphs 1 and 3 permits nearly all secular killings of animals. If the killing is *not* for food, it is outside the scope of the prohibition in ¶1. If the killing is *specifically* for food, it can be licensed and exempted under ¶3.

But petitioners' sacrifices are forbidden by ¶1's express prohibition of "sacrifice." Petitioners fall within ¶1's prohibition, because most of the animals are eaten in a ritual feast following the sacrifice. Thus, petitioners "intend" to use the animals for food. But petitioners are not within ¶3's exception, because the City would not grant a license for sacrifice, and because in the City's view, the sacrificed animals are not raised "specifically" for food. In the City's view, the primary purpose is religious worship, not food.

This distinction between primary and secondary purposes runs through the ordinances. "Sacrifice" is defined as "not for the *primary* purpose of food consumption." The courts below concluded that Kosher slaughter is exempt from Hialeah's ordinances, because those courts believed that Kosher slaughter is for the primary purpose of food consumption and only secondarily for religion. Pet.App. A31. The ordinances apply to Santeria sacrifice only on the theory that its priorities are reversed -- that sacrifice is primarily for religion and only secondarily for food.

By tying the ordinance to a purpose that is secondary to petitioners' religion, but primary to many secular killings of animals and perhaps primary to other religious killings, and by distinguishing primary from second-

ary purposes, the City has once again singled out petitioners for special and discriminatory regulation. Discrimination between religions violates the Establishment Clause, *Larson v. Valente*, 456 U.S. at 244, as well as the free exercise rights of Santeria. Unless justified by a compelling interest, ¶1 is unconstitutional.

ii. **Paragraph 2.** Paragraph 2 is even more obviously discriminatory. It forbids killing or sacrifice "for any type of ritual," "whether or not" the animal is later consumed as food. Once again, the essential element of the violation is ritual sacrifice. For a group that participates in ritual sacrifice, food consumption is not necessary to a violation of Ord. 87-52. All of ¶2, and the prohibition on "sacrifice" in ¶1, expressly discriminate against religion. Unless justified by a compelling interest, these provisions are unconstitutional.

d. **Ord. 87-72.** Ord. 87-72 defines "slaughter" to mean "the killing of animals for food." It then provides:

Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

....

Section 6. This Ordinance shall not apply to any person, group or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

Given the City's distinction between "sacrifice" and "slaughter," this Ordinance appears inapplicable to peti-

tioners. If petitioners are engaged in "slaughter," all these ordinances are plainly pre-empted by Florida and federal statutes protecting ritual slaughter.¹⁰ The City successfully argued below that the ordinances are not pre-empted by Florida law because petitioners are *not* engaged in slaughter. Br. of Appellee in Ct.App. 46-47. But the City cannot apply Ord. 87-72 unless it argues that petitioners *are* engaged in slaughter. The City cannot have it both ways; Ord. 87-72 is either pre-empted or inapplicable. This ordinance depends for its enforcement on simultaneous assertion of two inconsistent legal theories; such an ordinance highlights the City's determination to get petitioners one way or another.

The attempt to apply Ord. 87-72 also depends on a discriminatory misclassification of petitioners' conduct. By again focusing on the secondary fact that many of the sacrificed animals are subsequently eaten, the City misclassifies petitioners' church as a slaughterhouse. This misclassification enables the City to exclude petitioners' church, because no land in the city is zoned for slaughterhouses. Pet.App. A33 n.46.

As a deputy city attorney testified, petitioners' church is not a slaughterhouse. R15-1345. It is not in the business of selling food in the open market, and the numbers of animals sacrificed are a tiny fraction of the numbers killed in a slaughterhouse. Section 6 recognizes that even small commercial operations are not slaughterhouses and do not require the same regulation as slaughterhouses. But it exempts only the small scale slaughter of cattle and hogs. It does not exempt petitioners' goats and chickens.

It is not neutral to apply slaughterhouse rules to petitioners' sacrifices unless the City applies slaughter-

¹⁰ These statutes are briefly described *infra* in note 12 and accompanying text.

house rules to all the other killings of animals in the City. The City cannot avoid all scrutiny of its justifications by arbitrarily equating any killing of an animal for food with the operation of a slaughterhouse. Nor can it enforce a law enacted for the very purpose of suppressing the central religious ritual of a minority religion. Unless justified by a compelling interest, Ord. 87-72 is invalid.

* * *

Smith leaves precious little protection for the free exercise of religion. If this Court permits even that protection to be evaded by clever drafting and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause. As Justice Harlan once said in a related context, "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970)(concurring).

This Court has long recognized that legislatures and city councils could readily suppress unpopular groups unless courts scrutinize legislative motive and legislative gerrymanders. See *Fowler v. Rhode Island*, 345 U.S. 67 (1953)(ordinance drafted to forbid Jehovah's Witness services without reaching more conventional religious services); cf. *Davis v. Bandemer*, 478 U.S. 109 (1986)(political gerrymandering); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(racial gerrymandering); *Guinn v. United States*, 238 U.S. 347 (1915)(grandfather clause); *Wick Wo v. Hopkins*, 118 U.S. 356 (1886)(discriminatory enforcement). If ordinances like these from Hialeah are allowed to stand, it will be open season on unpopular religions.

II. THE ORDINANCES ARE NOT JUSTIFIED BY A COMPELLING INTEREST

A. The Courts Below Applied Erroneous Legal Standards To The Compelling Interest Issues

Employment Division v. Smith divides laws restricting religious exercise into those that are religiously neutral and those that are not. Laws that are religiously neutral are immune from strict scrutiny. Laws that are not religiously neutral can be justified, if at all, only by the most compelling state interests. It is hard to imagine a compelling need to discriminate against religion; certainly no such compelling need is presented on this record.

In the courts below, the compelling interest test was watered down beyond recognition. The courts below misunderstood the compelling interest test in three distinct ways. We identify the correct legal standards in this section, and apply those standards in section IIB.

1. The Courts Below Erroneously Relied On Interests That The City Does Not Pursue In Secular Contexts

The City's alleged compelling interest must fit the law it is alleged to justify. If a law discriminates against religion, the City must show a compelling reason *for discriminating against religion*. The City cannot suppress religious worship in pursuit of interests that it does not pursue in secular contexts. Rather, the City must show that the religious practice of animal sacrifice poses some special danger that is not posed by any permissible reason for killing animals, that the City's interest in suppressing this special danger is compelling, and that no less restrictive means would satisfy its interest.

The City's obligation to justify the discriminatory feature of discriminatory ordinances is inherent in the compelling interest test; it is also inherent in *Smith's* emphasis on discrimination as the trigger for strict scrutiny.

The requirement is explicit in other opinions of this Court, most recently in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501. *Simon & Schuster* squarely holds what *Smith* implies: a law that singles out First Amendment activity for different and hostile treatment can be justified only by a compelling interest in the statutory classification -- not by more general interests that are not generally pursued.

The Court in *Simon & Schuster* found compelling interests in compensating crime victims and in depriving criminals of the fruits of their crime. *Id.* at 509-10. But the Court unanimously held these compelling interests irrelevant, because they did nothing to justify New York's distinction between income and assets from publications and income and assets from all other sources. *Id.* at 510. The fatal defect was that "the *distinction* drawn by the Son of Sam law has nothing to do with the State's interest." *Id.* (emphasis added).

There, as here, the law was not generally applicable. There, as here, the law singled out an activity protected by the First Amendment. There, as here, the state relied on general interests that it did not pursue in other contexts. The decision below is squarely inconsistent with *Simon & Schuster*; the only difference is that one case involves speech and the other religious exercise.

The Court put the same point in slightly different terms in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), invalidating a law that forbade the mass media to publish the names of rape victims. The state's failure to prohibit anyone else from spreading the names of rape victims raised "serious doubts" about whether the statute actually served the state's interest. *Id.* at 540. The Court said that the state "must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly." *Id.* In *Florida Star's* formulation, the state's failure to generally pursue its alleged interest shows that

even the state does not consider the interest compelling, or that even if the interest is compelling, the statute does not serve that interest. In *Simon & Schuster's* formulation, even a compelling general interest does not justify a narrower and discriminatory classification. These are minor variations on the same point: because the compelling interest must fit the challenged statute, the City must have a compelling interest in singling out religion.

Earlier cases also illustrate the point. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585-90 (1983) ("critical" interest in raising revenue "cannot justify the special treatment of the press"); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979) ("even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose" where it singles out newspapers for special regulation).

These cases reflect a settled rule that where the compelling interest test applies to discriminatory regulation, the state must show a compelling interest in discriminating. Justice Kennedy, concurring in *Simon & Schuster*, would have gone further. He would abandon the compelling interest test and apply an absolute rule against content discrimination, subject to certain narrowly defined categorical exceptions. 112 S.Ct. at 512-15. Similar reasoning here would lead to an absolute rule prohibiting discrimination against religion. Justice Kennedy's absolute rule would avoid the temptation to rationalize discrimination against unpopular minority religions; it would recognize that it is never necessary or legitimate to discriminate against religious exercise.

Neither court below required the City to prove a compelling interest in discriminating against religion. Rather, the City was permitted to rely on interests that it does not pursue in secular contexts. Under either Justice Kennedy's formulation, or the more traditional compelling interest test, the judgment below cannot stand.

2. The Courts Below Erroneously Equated "Compelling" Interests With "Legitimate" Interests

The courts below reduced the requirement of a "compelling" interest to a requirement of a rational or legitimate interest. This appears most clearly in the following passage, from a part of the district court's opinion on which the court of appeals relied:

Equally compelling is the City's interest in the protection of animals from cruelty and unnecessary killing. "It has long been the public policy of this country to avoid unnecessary cruelty to animals." *Humane Society of Rochester v. Lyng*, 633 F.Supp. 480, 486 (W.D.N.Y. 1986). The Florida Supreme Court observed more than two decades ago that "it is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968).

Pet.App. A44-A45.

This is the entire discussion of whether the City's interest in protecting animals is compelling. By treating the two cited cases as dispositive on the question whether a compelling interest was at stake, this passage assumes that any "public policy" or any "valid exercise of the police power" satisfies the compelling interest test. And because the courts below treated the interest in protecting animals as "equally compelling" with the alleged threats to health, it appears that this watering down of the compelling interest test infected the entire opinion. The lower courts' approach "relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already pro-

vides" in cases not subject to strict scrutiny. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141-42 (1987)(opinion of the Court, quoting *Bowen v. Roy*, 476 U.S. 693, 727 (1986)(O'Connor, J., concurring in part)).

The lower courts' approach shows fundamental misunderstanding of the compelling interest test. It is not every or even most legitimate government interests that are compelling. "Compelling" does not mean merely a "reasonable means of promoting a legitimate public interest." *Hobbie*, 480 U.S. at 141. Compelling does not mean merely "important." *Thomas v. Review Board*, 450 U.S. at 719. Rather, "compelling interests" include only those few interests "of the highest order," *Smith*, 494 U.S. at 888; *Wisconsin v. Yoder*, 406 U.S. at 215, or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests," *Sherbert v. Verner*, 374 U.S. at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This Court explains "compelling" with superlatives: "paramount," "gravest," and "highest." Petitioners believe that these words mean what they say. The courts below did not.

Even such paramount interests are sufficient only if they are "not otherwise served," *Yoder*, 406 U.S. at 215, if "no alternative forms of regulation would combat such abuses," *Sherbert*, 374 U.S. at 407, and if the challenged law is "the least restrictive means of achieving" the compelling interest, *Thomas v. Review Board*, 450 U.S. at 718.

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children. 406 U.S. at 219-29. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The first two years of high school are basic to that function. But the state's interest in the first two years of high school was not sufficiently compelling to

justify a serious burden on free exercise. *Smith* reaffirmed *Yoder*. 494 U.S. at 881.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment. *Sherbert v. Verner*, 374 U.S. at 406-09, reaffirmed in *Smith*, 494 U.S. at 884. The City must show something more compelling than saving money, more compelling than educating Amish children.

This Court has found a compelling interest in only three free exercise cases.¹¹ In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, and the laws at issue were essential to national survival or to express constitutional norms: racial equality in education, *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983), collection of revenue, *United States v. Lee*, 455 U.S. 252, 258-60 (1982), and national defense, *Gillette v. United States*, 401 U.S. 437, 461-62 (1971). For example, the Court feared that "the tax system could not function" if every taxpayer could object to expenditures that allegedly violated his religious beliefs. *Lee*, 455 U.S. at 260.

Nothing in *Smith* reduced this stringent standard. A principal part of *Smith*'s rationale for restricting the scope of the compelling interest test was to maintain its

¹¹ Other cases rejecting free exercise claims refused to apply the compelling interest test, holding that it does not apply to restrictions on religious liberty in the military, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), in prisons, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), or to the government's refusal to itself participate in plaintiff's religious observance, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *Bowen v. Roy*, 476 U.S. at 699-700. Because each of these cases held the compelling interest test inapplicable, none of them found a compelling interest.

stringency in the narrower range of cases to which it would apply. This Court cautioned against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test." 494 U.S. at 888.

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text. See Douglas Laycock, "Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights," 99 Yale L.J. 1711, 1744-45 (1990)(book review). The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. If the City can overcome free exercise rights by invoking any legitimate public policy, or any valid exercise of the police power, then the Free Exercise Clause imposes no independent limits on the City's policies, and constitutional rights are reduced to mere exhortations.

3. The Courts Below Reversed the Burden of Proof

Under this Court's precedents, the City must prove its compelling interest. To do so, the City must prove that serious harms are actually occurring as a result of petitioners' sacrifices. It cannot rely on speculation about what might happen, or on theoretical risks unconfirmed by experience. Mere "fear or apprehension" cannot be enough, because government can always show fear and apprehension. "Any departure from absolute regimentation may cause trouble." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). "[O]ur Constitution says we must take this risk."

Id.

Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life." 406 U.S. at 224. This Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." *Id.* at 224, 225. Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But this Court rejected them all for lack of evidence that they were really happening. *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. at 835; *Thomas v. Review Board*, 450 U.S. at 718-19; *Sherbert v. Verner*, 374 U.S. at 407.

The courts below turned this evidentiary requirement on its head, repeatedly requiring the Church to prove that no animal sacrifice would ever cause harm. See Pet.App. A13 ("there is no guarantee" that all arteries will be cut simultaneously); *id.* at A43 (relying on "a risk of physical harm"); *id.* at A45 ("plaintiffs have not shown" that regulating care of animals and disposal of carcasses would satisfy the City's concerns); *id.* at A46 n.59 ("Pichardo could give this Court no assurance" that deviant practitioners would obey regulations). Religious worshipers are not required to prove that there is no risk; instead the City is required to prove that serious harms are actually happening.

**B. When The Proper Legal Standards Are Applied,
It Is Clear That These Ordinances Do Not Serve
A Compelling Interest By The Least Restrictive
Means**

There is no compelling interest in this case, and this Court should say so. The Court can define "compelling interest" with synonyms and abstract explanations, but it can effectively convey its meaning only by holding that particular facts do or do not justify discriminatory regulation of religion. With complex legal concepts like compelling interest, the "outer limits will be marked out through case-by-case adjudication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). Thus, in the great bulk of the cases cited in this part of the brief (part II), this Court itself applied the compelling interest test, and held that the government had or had not shown a compelling interest. The record is ample to do so here. The factual basis of the lower courts' holding is clear, and that factual basis is clearly insufficient to support a conclusion of compelling interest.

The courts below reached legal conclusions of compelling interest on the basis of expert testimony to specific facts. The issue presented to this Court is whether these specific facts justify discriminatory restrictions on religion. That is a legal question on which this Court has the final word.

To answer that legal question, this Court must "make an independent examination of the whole record." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). But this independent examination of the record is for a limited and defined purpose. The district court accepted the testimony of the City's experts, and petitioners do not ask this Court to reconsider that determination. But the district court's findings must be read in light of the specific facts to which those experts testified, and those facts must be separated from

conclusions that depend on judgments of law, policy, or degree.

When this separation is made, the evidence simply will not support a legal conclusion of compelling interest in discriminatory suppression of animal sacrifice. Most of the City's broad claims of government interest are speculative and unproven, and none of them is sufficiently important to be compelling. In analogous secular contexts, the City either does not pursue these interests at all, or it pursues them to a lesser degree and by less restrictive means.

1. The Harm To Animals

The courts below held that the City has a compelling interest in protecting animals from "cruelty and unnecessary killing." Pet.App. A44. The holding that animals are *unnecessarily* killed depends on the impermissible conclusion that petitioners' worship is unnecessary. See *supra* at 21-23.

Apart from lack of necessity, the trial judge held that the City has a compelling interest in preventing three kinds of cruelty. Two of these holdings are obviously discriminatory. He found that animals experience fear prior to sacrifice, and that some suppliers of animals inadequately feed and house them. Pet. App. A17-A18, A45. But no government agency attempts to eliminate these problems in secular contexts, so they cannot be compelling reasons for preventing religious worship. One of the City's experts testified that animals would experience similar fear in a commercial slaughterhouse or any other strange place. R12-911. Another testified that no government agency regulates the care of farm animals. R13-1014, 1016. In any event, the commercial suppliers of sacrificial animals can be regulated directly. Commercial abuses by others are not a reason to suppress petitioners' worship.

We come then to the essence of the alleged cruelty issue. The animals are sacrificed by cutting the carotid arteries with a single knife stroke. Pet. App. A12. Cutting the carotid arteries is approved as humane by both Florida and federal statutes on religious slaughter. Fla. Stat. Ann. §828.23(7)(b)(1976)(Br.App. A7); 7 U.S.C. §1902(b)(1988).¹² The other approved method, used in non-Kosher slaughterhouses, is to render the animal unconscious before slaughter. 7 U.S.C. §1902(a)(1988).

Based on the testimony of the City's expert, Dr. Fox, the trial court found that "there is no guarantee" that the priest can cut all the arteries at the same time, that some animals have third and fourth carotid arteries, and that sometimes, the arteries close themselves off, thus delaying death. Pet.App. A13. Dr. Fox testified that if all the arteries were severed simultaneously, the animal would become unconscious "very rapidly." R12-891. But if fewer than all the arteries were severed, the animal would become unconscious "slowly," over a period of "many seconds to minutes." *Id.*

The City's alleged compelling interest is to protect animals from this brief period of consciousness in those cases in which the priest fails to sever all arteries simultaneously and does not realize that he has failed. Dr. Fox did not estimate, and the trial judge did not find, how often such errors would occur. This risk of brief

¹² These substantially identical provisions, together with related provisions in Fla. Stat. Ann. §828.22(3)(1976)(Br.App. A6) and 7 U.S.C. §1906 (1988), declare a policy of protecting religious liberty, exempt ritual slaughter in accord with the requirements of any religious faith, and subject ritual slaughter to alternative, less restrictive regulations. Petitioners argued unsuccessfully in the court of appeals that these laws pre-empt the Hialeah ordinances at issue here. Br. of Appellants in Ct.App. 53-55. The federal pre-emption argument was not preserved in the district court, and therefore is not pressed here. Even so, the federal government's resolution of these issues is further evidence that the City's interest is not compelling.

harm to animals is simply insufficient to justify suppression of a constitutionally protected worship service. "The magnitude of the State's interest in this statute is not sufficient to justify" these ordinances. *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 104 (emphasis added). Not only did the City fall far short of showing a compelling interest; the City did not prove any harm at all. All living things must die, and the City made no effort to prove that sacrifice is more painful than the alternatives for these animals.

In secular contexts, state and local policy permits practices that inflict much greater and longer lasting pain on animals. Certainly "there is no guarantee" that hunted, fished, or trapped animals will die "very rapidly," or even that they will die in "seconds to minutes." In fact, state and local policy on hunting, fishing, and trapping shows little concern for the suffering inflicted on animals. Using one animal to hunt another is expressly exempted from the animal cruelty statutes. Fla. Stat. Ann. §§828.122(6)(b), (6)(e)(Supp. 1992), incorporated in Ord. 87-40. Trapping is legal in Florida. *Id.* §§372.57(2)(i), (2)(j), (3). Florida has hunting seasons in which modern firearms are forbidden but muzzle-loading guns are permitted, *id.* §372.57(5)(c), and seasons in which firearms are forbidden but bow hunting is permitted, *id.* §372.57(5)(d). No weapon is guaranteed to achieve a clean kill, but these pre-modern weapons are especially likely to inflict nonfatal injury, festering wounds, or slow death. Dr. Fox was opposed to bow hunting. R12 at 912-13. But Florida actively encourages the activities that cause these risks, and residents of Hialeah may participate.

Other areas of regulation reveal a similar tolerance of pain inflicted for secular reasons. The humane slaughter rules do not apply at all to any person slaughtering and selling "not more than 20 head of cattle nor more than 35 head of hogs per week." Fla. Stat.

Ann. §828.24(3)(Supp. 1992)(Br.App. A7), incorporated in Ord. 87-40. Neither state nor local law requires exterminators to use the most humane methods of killing animals. It is permissible to inflict "pain and suffering" on animals "in the interest of medical science." *Id.* §828.02 (1976), incorporated in Ord. 87-40.

Dr. Fox's specific testimony, on which the district court relied, reveals the standards on which he based his conclusion that sacrifice is inhumane. Under Dr. Fox's standards, a method of sacrifice is unacceptable if it takes "seconds to minutes" when something goes wrong, and if no one can "guarantee" that nothing will ever go wrong. If applied generally, these standards would shut down Kosher slaughterhouses as well as Santeria worship services. Dr. Fox thought the Jewish and Muslim knife stroke from the front of the throat is somewhat more reliable than the Santeria knife stroke, which goes from one side through to the other. R12-887. But he testified that animals killed in Kosher slaughterhouses often fail to die immediately, R12-881, and he supports more restrictive regulation of Kosher slaughterhouses. R12-902, 917. Kosher slaughterhouses operate under the statutory exemptions described in footnote 12, but Dr. Fox's organization would repeal those exemptions. R14-1056.

No legislature has applied Dr. Fox's standards to Kosher slaughterhouses, but the courts below relied on Dr. Fox's standards to uphold suppression of Santeria. Because Florida and Hialeah permit humans to inflict much greater suffering on animals for a wide variety of secular reasons, *and* because the interest in protecting animals from religious sacrifice is simply not important enough to override a constitutional right, this interest cannot be compelling.

2. The Alleged Threat To Public Health

The trial judge found a threat to public health, because some unidentified practitioners of animal sacrifice

sometimes improperly dispose of carcasses in public places. Pet.App. A43. Dead animals harbor germs, and the germs can be spread by other animals that come to feed on the carcass. But the judge found that "[t]here have been *no* instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18 (emphasis added).

The City's interest in eliminating this marginal increment to the risk of disease is not compelling. The risk is not different from the risk from any other organic garbage, and the incremental risk is a tiny part of the total problem. The district court's finding of increased risk was based on the testimony of Mr. Walter R. Livingstone, Environmental Administrator for the Dade County Department of Public Health. But he testified that the problem comes from many sources:

We do find dead chickens or dead animals, dead fish is one thing, dead garbage in fact, garbage from restaurants and things like that, animal meat parts and things like that this is where they provide the food for the rat, the rat comes and then seeks a harbor-age area and makes regular runs.

R11-566.

Q. In your study of rats, did you find the restaurants to be probably the largest place that rats congregate?

A. I wouldn't say the largest. They're very commonplace. Because of the very fact that we have so many other facilities. A lot of times, public buildings are a good place. Restaurants would be one because, generally speaking, because of the garbage, they provide a lot of food for the rodents . . .

R11-590.

I don't believe what we're talking about here today has anything to do with animal sacrifice.

It is just the way that food, chickens, parts, et cetera, are handled and their presence can increase the spread of disease.

R11-592.

As I said before, you are trying to change this into animal sacrifice, and I haven't been speaking of animal sacrifice at all. I am talking about the possibility, the probability, the transmission of disease from animal to human via the description, via the situations you have asked me about all day.

R11-594.

There was no direct evidence of the number of sacrificed animals improperly disposed of, but there was evidence that the problem is modest. Ms. Zorida Diaz Albertini, Director of Animal Services for Dade County, testified that two crews pick up all the dead animals in the public right of way in Dade County. R10-450. She testified that "the majority of the animals are cats and dogs." R10-452. In addition, "[w]e get raccoons, we get armadillos, birds, all kinds of wild animals." *Id.* Cats, dogs, raccoons, armadillos, and wild animals are not sacrificed; most birds are not sacrificed. She did not mention any of the animals that are sacrificed.

Thus, according to the record evidence, the problem of improperly discarded sacrificial animals is a small part of the problem of dead animals, which in turn is a very small part of the problem of organic garbage. The plain implication of Mr. Livingstone's testimony is that the risk of disease from the garbage dumpsters of restaurants and public buildings -- and from grocery stores, butcher

shops, apartment buildings, and private homes -- dwarfs the risk of disease from the improper disposal of sacrificed animals. Ms. Diaz Albertini's testimony is that cats and dogs are more numerous -- "a majority" -- than improperly discarded sacrificed animals.

The City has not banned all ownership of cats and dogs to keep a few of them from being hit by cars, but it has banned all sacrifice of animals to keep a few of them from being improperly discarded. Similarly, Mr. Livingstone testified that his department gets "frequent complaints from neighbors about the way that veterinarians dispose of their animal remains," R11-556, but these complaints have not led the City to ban the practice of veterinary medicine. The City's prophylactic ban on religious exercise is not neutral. It is also inconsistent with the reasoning in *Schneider v. State*, 308 U.S. 147, 162-63 (1939). There the Court held that cities could not ban all distribution of leaflets because some leaflets were improperly dropped in the streets.

The City can address the problem of improper disposal directly, by requiring proper disposal and by prosecuting violators. It is not difficult to properly dispose of a sacrificed animal. Mr. Livingstone testified that it is safe to put the carcass in a plastic bag and to put the plastic bag in a garbage can. R11-555. It would be especially easy to detect improper disposals from a fixed and public place of worship, such as that proposed by petitioners.

The trial judge found a compelling interest in public health, but not because he found a grave abuse, and not because he found that animal sacrifice was more dangerous than any other source of organic garbage. He found a compelling interest because he equated compelling interest with any incremental reduction of risk, and because he let the City prohibit religious exercise for reasons that the City does not deem sufficient to justify prohibition of secular conduct.

3. The Alleged Threat To Private Health

The courts below also found a threat to private health. Many of the sacrificed animals are eaten, and the meat is not inspected by any public authority. But there was no evidence that any person has ever become ill from eating a sacrificed animal.

Once again, the City relies on an interest that it pursues only with respect to religious sacrifice. Hunters eat their kill, and fishers eat their catch, but neither Florida nor Hialeah requires its hunters and fishers to submit this meat for public inspection. A Florida statute requires inspection of commercially sold meat. Fla. Stat. Ann. §585.70 *et seq.* (1992 Supp.). But the statute has several express exemptions, including slaughter of animals raised for the use of the owner and "members of his household and nonpaying guests and employees." §585.88(1)(a). Thus, the relevant public policy is that the owner of an animal can kill it for noncommercial food consumption, and that any risk from this activity is too small to justify government regulation. The interest in eliminating this small risk does not suddenly become compelling when the animal is sacrificed as part of a worship service.

Once again, the trial court's error was to equate any incremental risk with a compelling interest. That standard would justify any regulation. As Mr. Livingstone testified, "There is always the threat of disease when you eat food." R11-591. Indeed, he testified that there is no "activity a human being can engage in without triggering the risk of disease." R11-585. Such a universal risk cannot be a reason for prohibiting a constitutionally protected activity.

4. The Alleged Interest In Zoning

Finally, the district court said that "the City has a compelling interest in prohibiting the slaughter or sacri-

fice of animals within areas of the City not zoned for slaughterhouse use." Pet.App. A45. Neither court explained this holding, and neither court made any findings to support it.

There is no finding and no evidence that religious sacrifice of animals presents the same problems as slaughterhouses. Indeed, the City's evidence is to the contrary, because religious sacrifice involves many fewer animals at a time. A Deputy City Attorney testified that a church sacrificing animals is not a slaughterhouse. R15-1345. The City persuaded the trial court that Santeria's secrecy makes regulations unenforceable. Pet. App. A46 n.59. If the practice is difficult to detect even when you search for it, it cannot be a compelling zoning problem.

A church practicing frequent animal sacrifice could be located in any zone that permits restaurants, grocery stores, butchers, veterinarian offices, pet shops, humane societies, or farms. The public health officer testified that the problems of disposal and sanitation are analogous. *See supra* at 42-43. Persons practicing occasional sacrifice in their homes pose no more threat than hunters who occasionally bring their kill back to their homes, and much less threat than the daily disposal of meat scraps and other garbage by the entire population of Hialeah. As previously noted, even a whole carcass can be safely disposed of in a plastic bag and a garbage can. R11-556.

In fact, the Hialeah ordinances are not zoning laws at all. The zoning characterization ignores the context of these ordinances, the express purpose of preventing the exercise of petitioners' religion, and the gerrymanders to implement that purpose. The ordinances do not confine petitioners' worship to an appropriate zone; they exclude it from the City. On the other hand, the ordinances do not exclude all killing of animals from the City. Veterinarians, humane societies, pet owners, exter-

minators, seafood restaurants, fishers, and farmers may kill animals in the City. The zoning rationale cannot disguise the patent discrimination against religion in these ordinances.

The Fifth Circuit has held that the zoning power may not exclude a church from all accessible locations within the city. *Islamic Center, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). To similar effect in a speech case is *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, holding that a municipality cannot use the zoning power to exclude all live entertainment from its borders. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 76-77, quoting *Schneider v. State*, 308 U.S. 147, 163 (1939).

These cases are not affected by *Employment Division v. Smith*. Neither Florida nor Hialeah has any neutral, generally applicable law against killing animals. In the absence of such a law, religious sacrifice of animals is a constitutionally protected activity. The rule of *Schad* and *Islamic Center* is that a constitutionally protected activity cannot be zoned out of the City and confined to the hinterlands.

Even if the ordinances were neutral, the zoning rationale would be within *Smith*'s exception for "individual" consideration. Modern zoning and land use law is administered through development agreements, building permits, zoning permits, certifications, special exceptions, variances, waivers, special use permits, amortization of nonconforming uses, and other procedures through which owners and land use authorities negotiate the permissible uses for each parcel of land. See, e.g., Fla. Stat. Ann. §163.3220 et seq (1990). These procedures inherently involve the sort of individualized consideration in which religion must be treated equally with other favored interests. Because zoning law "has in place a system of individualized exemptions, it may not refuse to extend that

system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884.

• • •

The pattern is the same with respect to all the alleged compelling interests. If the Court will examine the specific facts to which the City's experts testified, no compelling interest is shown. When courts accept the experts' conclusory labels, like "increased risk" or "inhumane," effective power to decide the controlling question of law is delegated from the courts to expert witnesses. These witnesses are called by parties and may be highly partisan on the issues in the case.¹³ Only courts can decide whether the specific facts in evidence show a compelling interest sufficient to justify suppression of the central religious ritual of an ancient but unpopular minority faith. Under the standards repeatedly applied by this Court, the interests alleged here are plainly insufficient.

¹³ For example, Dr. Fox was Vice-President of the Humane Society of the United States, Pet.App. A13 n.18, and the City's witness Mr. Paulhus was its regional director, R13-976. Their organization filed a brief in the court of appeals "as *Amicus Curiae* in Support of Appellee, City of Hialeah."

CONCLUSION

Hialeah has not made it a crime to kill animals. Rather, Hialeah has made it a crime to sacrifice animals to one's God. Whatever the details and minor differences among the ordinances, the fundamental question in this case is whether religious animal sacrifice can be singled out for discriminatory prohibition. This Court's cases are clear; the answer is no.

Justice Scalia's description of the law in *Florida Star v. B.J.F.* is equally apt here:

This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest "of the highest order."

491 U.S. at 542 (concurring). Substitute "an unfamiliar religion" for "the press," and his description fits this case perfectly. Hialeah is prepared to suppress religious sacrifice of animals, but it is not prepared to give up all the other reasons for which the City and its citizens kill animals every day. Hialeah has done precisely what the Constitution most squarely forbids.

This Court should reverse the judgment below and remand the case to the district court for entry of a decree that would forbid the City to enforce these ordinances against petitioners' religious practices.

Respectfully submitted,

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Dated: May 22, 1992

APPENDIX

CITY OF HIALEAH ORDINANCE NO. 87-40

Adopted June 9, 1987

WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah;

....

Section 1. The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828 - "Cruelty To Animals" (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

....

CITY OF HIALEAH ORDINANCE NO. 87-52

Adopted September 8, 1987

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida;

....

Section 1. Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 "Definitions" and 6-9 "Prohibition Against Possession Of Animals for Slaughter or Sacrifice", which is to read as follows:

Section 6-8. Definitions

1. Animal - any living dumb creature.
2. Sacrifice - to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

3. Slaughter - the killing of animals for food.

Section 6-9. Prohibition Against Possession of Animals for Slaughter or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

....

CITY OF HIALEAH ORDINANCE NO. 87-71

Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community;

....

Section 1. For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private rit-

ual or ceremony not for the primary purpose of food consumption.

Section 2. For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

....

CITY OF HIALEAH ORDINANCE NO. 87-72

Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, in contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.

....

Section 1. For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

Section 2. For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

....

Section 6. This Ordinance shall not apply to any

person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

....

CITY OF HIALEAH RESOLUTION NO. 87-66

Adopted June 9, 1987

WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and

WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.

CITY OF HIALEAH RESOLUTION NO. 87-90

Adopted August 11, 1987

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida;

....

NOW, THEREFORE, BE IT RESOLVED BY

THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, Florida. Any individual or organization that seeks to practice animal sacrifice in violation of state and local law will be prosecuted.

**WEST'S FLORIDA STATUTES ANNOTATED
CHAPTER 828. CRUELTY TO ANIMALS**

828.12. Cruelty to animals

[1987 version, as incorporated into Ord. 87-40]
(1982 Fla. Laws ch. 82-116, §1)

Whoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or by a fine of not more than \$5,000, or both.

828.12. Cruelty to animals

[as amended in 1989, now in effect as Florida law, but not part of Hialeah law]

(1) A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or by a fine of not more than \$5,000, or both.

(2) A person who tortures any animal with intent to

inflict intense pain, serious physical injury, or death upon the animal is guilty of a felony of the third degree, punishable as provided in §775.082 or by a fine of not more than \$10,000, or both.

828.22. Humane slaughter requirement

....

(2) It is therefore declared to be the policy of this state to require that the slaughter of all livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods and to provide that methods of slaughter shall conform generally to those employed in other states where humane slaughter is required by law and to those authorized by the Federal Humane Slaughter Act of 1958, and regulations thereunder.

(3) Nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this act. For the purposes of this action the term "ritual slaughter" means slaughter in accordance with §828.23(7)(b).

828.23. Definitions

As used in §§828.22 to 828.26, the following words shall have the meaning indicated:

....

(7) "Humane method" means either:

(a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical, or other means that are rapid and effective, be-

fore being shackled, hoisted, thrown, cast, or cut; or

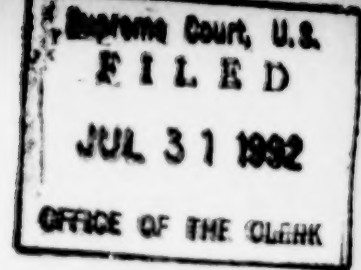
(b) A method in accordance with ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

828.24. Prohibited acts; exemption

(1) No slaughterer, packer, or stockyard operator shall shackle, hoist, or otherwise bring livestock into position for slaughter, by any method which shall cause injury or pain.

(2) No slaughterer, packer, or stockyard operator shall bleed or slaughter any livestock except by a humane method.

(3) This act shall not apply to any person, firm or corporation slaughtering or processing for sale within the state not more than 20 head of cattle nor more than 35 head of hogs per week.



(14)

No. 91-948

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
AND ERNESTO PICHARDO,

Petitioners,

vs.

CITY OF HIALEAH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the free exercise clause of the First Amendment invalidates the City of Hialeah's ordinances regulating the possession, slaughter, and sacrifice of animals?

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STATEMENT OF THE CASE AND FACTS

This litigation concerns the constitutionality of four ordinances adopted by the City of Hialeah in the summer and fall of 1987 on the subject of possessing, slaughtering and sacrificing animals within the City limits. Petitioners, The Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo, one of the priests of the Church, brought this action in September 1987 for a declaratory judgment, injunctive relief and damages against the City, the City Council and Mayor.

The United States District Court for the Southern District of Florida (Spellman, J.), without a jury, conducted a seven day trial in July and August, 1989 on the issues of whether the City ordinances were invalid under the First Amendment or were preempted by state law.^{1/} On October 5, 1989, the court rendered its twenty-one (21) page published decision affirming the constitutionality of the Hialeah ordinances in all respects. 723 F. Supp. at 1467-88.

Petitioners ignore the district court findings that three of the four ordinances primarily are zoning regulations that prohibit animal slaughter except in areas properly zoned for slaughterhouses. 723 F. Supp. at 1481. The district court found that Petitioners never sought any relief from these zoning ordinances, and that the constitutionality of the

^{1/} The district court also considered whether the City, in violation of 42 U.S.C. § 1983, harassed and discriminated against Petitioners with respect to building permits and a variety of municipal services. The district court rejected these claims in their entirety after trial. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1488 (S.D. Fla. 1989). Petitioners did not appeal this ruling.

ordinances as applied to Petitioners were not at issue in the case. *Id.* at 1479.^{2/}

Petitioners misrepresent several critical findings of the district court. The district court expressly found that the intent of the City in enacting the ordinances was "to stop animal sacrifice whatever individual, religion or cult it was practiced by," 723 F. Supp. at 1479, not "to interfere with religious beliefs." 723 F. Supp. at 1476. The district court determined that the ordinances were enacted for a permissible purpose: to bar "indiscriminate slaughter in areas of the City not zoned for such activities because of the attendant risk to both public health and animal welfare." 723 F. Supp. at 1488. The district court found, therefore, that the ordinances "have at most an effect on Plaintiffs' religious conduct that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484. Petitioners misrepresent the record by suggesting that the evidence at trial established that animals are killed by the humane method prescribed by Florida and federal law. Instead, the district court expressly found that "the method of killing is unreliable and not humane." 723 F. Supp. at 1486.

Because the district court rendered its decision before the decision of this Court in *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), the court examined and found that the ordinances were justified by compelling governmental interests which outweighed any incidental effect upon Petitioners' religious practices. 723 F. Supp. at 1483-87.

^{2/} Petitioners, on July 12, 1989, just prior to trial, sought to slaughter animals in the Church. 723 F. Supp. at 1477 n. 43.

The United States Court of Appeals for the Eleventh Circuit, without dissent, entered a *per curiam* affirmance of the district court judgment on June 11, 1991. The Eleventh Circuit noted that the district court made extensive findings of fact, *see* 723 F. Supp. at 1469-1479, App. A2,^{3/} which were not contested by Petitioners. The Eleventh Circuit affirmed the district court's conclusion that the ordinances passed by the City were not prohibited by the First Amendment. App. A2. Noting that the district court used an "arguably stricter standard" in determining whether the ordinances violated the United States Constitution than this Court did in *Smith*, 494 U.S. 872 (1990), the Eleventh Circuit determined it unnecessary to decide the effect of *Smith* on this case.^{4/}

The fundamental question in this case is whether a municipality may, consistent with the First Amendment, enact regulations to prevent tens of thousands of chickens, goats, ducks, and other animals from being uncleanly held, inhumanely killed, and unsafely discarded throughout the homes and streets of an urban community. Although Petitioners' brief argues the point, the City has never denied

^{3/} References to the Appendix to the Petition for Certiorari are noted as "App." References to the Appendix attached to this Brief are noted as "App. Resp." References to the Record are noted as "R" followed by volume and page number.

^{4/} The court did not adopt Part C(2) of the district court's opinion, which contained an additional justification for the ordinances: the psychological harm to children exposed to animal sacrifices. Because of the sufficiency of the rationale for the ordinances upheld by the Eleventh Circuit, Respondent has not briefed the psychological harm to children issue. Amicus, The Humane Society of Washington, has done so and this court could, if necessary, rely on that aspect of the district court's decision. *See Blum v. Bacon*, 457 U.S. 132, 137 n. 5 (1982).

that Santeria is a religion or that animal sacrifice is a part of at least certain practices of the Church. The district court properly focused the trial on the disputed issues: the manner in which animal sacrifices actually occur, the basis for proscribing such killings, and the legislative purpose and effect of the challenged laws. The district court's findings, supported by the record, comprehensively and correctly resolve these issues.

Santeria is a religion which is practiced in South Florida today by approximately 50,000 to 60,000 practitioners. 723 F. Supp. at 1470. An unspecified number of these practitioners practice animal sacrifice. *Id.* Most of the alleged religious activity takes place in the individual homes of family groups and there is no intermingling between these groups. *Id.* In fact, few practitioners of Santeria know other practitioners outside their own group. *Id.* Petitioners' beliefs are based on the interpretation of an oral tradition and there is no organized worship, centralized authority, written code or tradition. *Id.* at 1471 n. 9.

1. The Widespread and Uncontrolled Problem of Animal Sacrifice

Petitioners seek to overturn the City ordinances so as to permit animal sacrifices in homes throughout the entire community. R-9-216. Thus, the issue of animal sacrifice here is not of a few animals being mercifully dispatched in a church ceremony, but rather the specter of thousands, indeed tens of thousands, of animals^{5/} being killed in homes and in the streets throughout South Florida with the

^{5/} These animals include chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles. 723 F. Supp. at 1471.

attendant problems of keeping and feeding the animals, and later, disposing of the remains. A single initiation rite involves sacrifice of between 20 and 30 animals. 723 F. Supp. at 1473 n. 22. As the district court observed, "that means that between 12,000 and 18,000 animals are sacrificed in initiation rites alone, during a one year period." *Id.* Most, but not all, of the animals are consumed. 723 F. Supp. at 1471.

2. Health Risks: Do We Need to Await a Plague?

The City proved and the district court found that the remains of the sacrificed animals create a health hazard because the remains attract flies, rats and other animals which serve as vectors of serious disease. 723 F. Supp. at 1474-75. Record evidence also established that the animal's blood is drained into pots and left for an indeterminate time, even months or years. 723 F. Supp. at 1473; R-10-379-380; R-9-278. One witness testified that his parents had practiced Santeria and, as a child, he had been offered blood to drink, but had refused. 723 F. Supp. at 1473, n. 21; R-14-1208-1214. Moreover, the viscera of animals eaten are discarded.

The City proved and the district court found that the remains of sacrificed animals are disposed in public places. R-10-379-390; R-11-658-59. The Church does not have any formal procedure for disposing of sacrificed animals. R-10-379. An expert for Petitioners, Dr. Wetli, testified that the disposition of animal remains after a sacrifice depends upon the ritual and how the practitioner interprets what the gods are telling him to do with the sacrificed remains. R-10-379. Because disposal of the remains of a sacrificed animal

is often made in accordance with the practitioner's interpretation of the wishes of his god, "[t]here is nothing consistent and nothing constant [in such disposal]." R-10-379. The Church is unable to monitor or control the way individual practitioners dispose of the sacrificed animals. 723 F. Supp. at 1471.

Consistent with this testimony, animal remains, along with items reflecting sacrifice, have been found in public places. 723 F. Supp. at 1474. Remains of sacrificed animals have been found at intersections, backyards, railroad tracks, homes, rivers, and by the sides of roads. R-10-377-378. Animal carcasses also have been found near rivers or canals, by stop signs, under palm trees, behind the Dade County Courthouse, and on people's lawns or on doorsteps. 723 F. Supp. at 1474, n. 29; R-14-1200; R-10-377. A goat, cut in half, was found at an intersection in Miami Beach. R-10-378.

There was also evidence that the remains of animals have been found strewn throughout homes and in backyards. A City of Miami Police Department identification technician testified that he responded to a call to a home where he found "several carcasses of dead animals, dead birds, a turtle, and goats and animal remains . . . in a line going from the living room into a kitchen area," R-12-765, and about 20 or 30 clay pots containing approximately 20-25 goat heads. R-12-766. In the backyard, he encountered dead birds, a dead turtle, and boxes of visceral material. R-12-766. Pichardo admitted that these things happen, but stated that the remains probably are from sacrifices of other religions or deviate practitioners of Santeria. 723 F. Supp. at 1474.

Uncontradicted evidence established that rats, flies and other animals attracted to the remains may themselves carry and exchange diseases, increasing the risk of spread of disease to humans. 723 F. Supp. at 1474-75. Areas where sacrificed animals are left can become a harborage for rats and fleas and the spread of disease to other animals and to humans is much more likely. *Id.* The potential diseases include dysentery, typhoid, cholera, salmonella, salmonosis, infectious hepatitis, yaws, trachoma, plague and many of the parasitic worms. 723 F. Supp. at 1475, n. 33, R-11-563. The district court found that the increased risk of disease and infestation and threat to the public health and welfare caused by indiscriminate animal slaughter was a compelling governmental interest. 723 F. Supp. at 1485-86.

3. The Inhumane Treatment of Animals Awaiting Sacrifice: Cages, Animal Farms, and Botanicas

Although animals may be obtained from many different sources, Petitioners purchase most sacrificed animals either from botanicas or from local farms that breed the animals specifically for sacrifice. 723 F. Supp. at 1474. Animals waiting for sacrifice are typically maintained in extremely overcrowded and filthy conditions. 723 F. Supp. at 1474; R-13-999-1011. In one botanica, a back room was filled with hundreds of pigeons, chickens, and goats crowded into cages so tightly that the animals could not even move. R-13-1010-1011. In botanicas, the animals are often not fed and watered in light of their sale for immediate sacrifice. 723 F. Supp. at 1474. The animals suffer intensely under these conditions. 723 F. Supp. at 1474. Unfortunately, monitoring and enforcement of animal

cruelty laws and regulations is ineffective. R-13-1014-1016; R-14-1207.

4. The Cruelty of Animal Sacrifice

The district court was faced with conflicting evidence on the humaneness of animal sacrifice methods. Pichardo testified that the priest punctures the neck of the animal with a knife, theoretically severing both of the main arteries and inducing unconsciousness and death. 723 F. Supp. at 1472. The City presented the expert testimony of Dr. Michael Fox, a recognized expert in veterinary medicine, who testified that the very method of killing described by Pichardo, a stabbing through the neck in hope of cleanly severing the carotid arteries, was unreliable in producing immediate death. R-12-880-881, 885-86. Dr. Fox testified that this method of killing would not consistently sever both carotid arteries. R-12-879. Dr. Fox explained at length the inherent unreliability of Petitioners' method of sacrifice and its cruel effect upon numerous types of sacrificed animals. R-12-881-890. Dr. Fox testified that an animal would remain conscious and perceive pain if both carotid arteries were not instantaneously and completely severed. R-12-890. There also was testimony that the heads of sacrificial birds are ripped from their bodies. R-14-1200; R-10-374.

The district court unequivocally resolved the conflict in the evidence regarding Petitioners' method of animal sacrifice against Petitioners. 723 F. Supp. at 1472-73. The district court found that Petitioners' method of killing is inhumane, unreliable and cruel. 723 F. Supp. at 1472-73. Dr. Fox' testimony was expressly found to be more credible than Petitioners' expert, *id.* at 1472-73, and the court concluded: "the method used in sacrificing the animals is

not humane, but in fact causes great fear and pain to the animal." 723 F. Supp. at 1473.

5. Passage of the Ordinances

The City addressed the problem of animal sacrifice by enacting a series of four ordinances. On June 9, 1987, the City adopted an emergency ordinance (No. 87-40) which simply adopted the language of Florida's state anti-cruelty statute, increased the penalty for a violation of the law and prohibited the slaughter of animals for food purposes, except in places where such activity is properly zoned and/or permitted under state and local law. *App. Resp.* at A1-3. On September 8, 1987, the City adopted an ordinance (No. 87-52) prohibiting the possession, slaughter or sacrifice of animals, except by licensed establishments where properly zoned. *App. Resp.* at A3-6. On September 22, 1987, the City adopted two further ordinances. Ordinance 87-72 prohibited the slaughtering of animals on premises which were not zoned for that purpose. *App. Resp.* at A10-13. Ordinance 87-71 restated that it was unlawful "for any persons, corporations or associations to sacrifice any animal" within the City. *App. Resp.* at A-11. Ordinance 87-71 also authorized registered groups to investigate animal cruelty complaints. *Id.*

SUMMARY OF ARGUMENT

This case is a facial challenge under the free exercise clause of the First Amendment to four municipal ordinances of the City of Hialeah, Florida. The standard for evaluating free exercise claims to such laws was clarified in *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S.

872 (1990). In *Smith*, this Court held that where state laws are "neutral" and "generally applicable", the courts need not inquire whether there exists a "compelling" state interest for the law and normally need not adjudicate case-by-case claims for exemption from the regulation by religious groups. The Hialeah ordinances are such laws. It is incredulous that Petitioners would even contend that certain parts of the ordinances -- those which adopt state animal cruelty laws and those which require slaughter of animals to take place in areas zoned for slaughterhouses -- raise any question of neutrality or general applicability. The prohibition on possession of certain animals within the City limits is similarly unassailable. The ordinances' prohibition of animal sacrifice applies, as the district court found, to animal sacrifice whether practiced by individuals, religious groups, non-religious groups, or cults. Therefore, all aspects of the Hialeah Ordinances are neutral, generally applicable and constitutional under *Smith*.

Petitioners would have this Court ignore the neutrality of the ordinances on their face because the City does not ban all killing of animals. Hialeah need not ban cattle ranchers, hunters, and exterminators before it can lawfully ban the sacrifice or slaughter of thousands of animals in homes and streets throughout the City. Animal sacrifices create a host of social ills -- ranging from cruelty to animals to disease risks to humans -- which differentiate the problem. It is no more persuasive for Petitioners to argue that animals are abused in other ways which Hialeah does not regulate that it would have been for the Native Indians in *Smith* to submit that tobacco smoking is as harmful as the ingestion of peyote. If the laws are "neutral", this Court should not second-guess the legislative judgment.

Even if parts of the Hialeah Ordinances were not neutral towards religion, no remand would be required to determine whether they are nonetheless justified by "compelling" state interests and tailored to protect those interests. Because this case was tried before *Smith* was decided, the district court applied strict scrutiny, and even under that more stringent test, had no difficulty in sustaining the ordinances in all respects. Those findings were adopted by a unanimous court of appeals and are fully supported by the record.

Fundamentally, this case rests on the distinction between "belief" and "conduct." There is no question that laws may greatly burden religious "conduct." Mormons in Utah may not legally practice polygamy. See *Reynolds v. U.S.*, 98 U.S. 145 (1878). Fundamentalists in Tennessee may not handle snakes in Church. See *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949). Orthodox Jews may not wear yarmulkes in the Armed Forces. See *Goldman v. Weinberger*, 475 U.S. 503 (1986). And, in Hialeah, practitioners of Santeria may believe whatever they wish but may not kill animals as an offering to their gods. To hold otherwise would, as this Court stated more than 100 years ago, "make the professed doctrines of religious belief superior to the laws of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds*, 98 U.S. at 166-67.

ARGUMENT

I. HIALEAH'S ORDINANCES ARE NEUTRAL, GENERALLY APPLICABLE LAWS AND THEREFORE DO NOT VIOLATE THE FIRST AMENDMENT

In *Employment Division v. Smith*, this Court held that a "neutral, generally applicable regulatory law" may be applied to religiously motivated conduct without compelling justification. 494 U.S. at 880. A law is "neutral" if it has a secular purpose that the State is free to regulate and neither advances nor inhibits religion. *Id.* at 887; *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990). A law is "generally applicable" if it applies neutrally to all members of society. *Smith*, 494 U.S. at 879-81; *Jimmy Swaggart Ministries*, 493 U.S. at 391-92. The application of such a law may affect religious exercise without triggering stricter scrutiny of the law's purpose and fit. *Smith*, 494 U.S. at 878-881.

Petitioners argue that *Smith* "gives new emphasis" to the neutrality requirement. Respondents respectfully suggest that *Smith* worked no change in this regard. Laws which overtly prohibit religious belief or discriminate against a particular religion always have been invalid. *Smith* recognizes that laws of general application which burden religious conduct, but which are otherwise non-discriminatory, should not be subjected to the more exacting test commonly referred to as "strict scrutiny." Certainly, there is no language in the decision which purports to raise the hurdle which ordinances, such as those at issue here, must clear to be deemed "neutral". Indeed, counsel for Petitioners has espoused in other forums that this Court's

decision in *Smith* was fundamentally misguided because it "strips the free exercise clause" of meaning.^{6/}

A. The Ordinances Are Neutral, Generally Applicable Laws Concerned With Animal Cruelty and Zoning

Hialeah's four ordinances are non-discriminatory, broadly applicable regulations which protect animals from cruel treatment and protect people from the health hazards attendant to the slaughter of large numbers of chickens, goats, and other animals. Whether viewed separately or together, the ordinances are not targeted at animal sacrifices for religious purposes, but all ritualistic killings of animals. This was the finding of the district court after an extensive trial. 723 F. Supp. at 184. Those findings were accepted unanimously by the court of appeals and are amply supported by the text of the ordinances themselves.

One of the ordinances, No. 87-40, adopted June 9, 1987, simply codifies verbatim Florida's animal cruelty law. Fla. Stat. § 828.01, *et seq.* (1986). The only change is an increase in penalty which the district court found was permissible and which is not challenged here. Certainly, a municipal ordinance which tracks a state statute speaking only to animal treatment and which does not even refer to ritualistic sacrifice is the epitome of neutral, broadly

^{6/} See Laycock, *The Supreme Court's Assault On Free Exercise, And The Amicus Brief That Was Never Filed*, 8 Journal of Law & Religion 99, 102 (1990) ("The Opinion appears to be inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent. It strips the free exercise clause of independent meaning.")

applicable legislation which *Smith* essentially insulates from more exacting scrutiny under the free exercise clause.

Petitioners do not purport to challenge much of the state law -- and, thus, also much of Ordinance 87-40 -- but contend that the term "unnecessarily" as it modifies "kill" requires an impermissible theological determination whether animal killings are necessary for religious purposes. Of course, nothing in the ordinance calls for launching upon such an ecclesiastical expedition and there is no record support that Hialeah intends to do so. The Attorney General of Florida has opined that the ritual killing of an animal is not a "necessary" killing under state law. *Op. Fla. Att'y Gen.* 87-56, Annual Report at 146 (1987). No claim that the law was unconstitutionally vague was litigated below, nor presented in the Petition for Certiorari here. Accordingly, any refinements as to whether in a given case the taking of animal life is necessary should properly await refinement in the state courts as the statute is applied. See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 574 (1947). See also *Wilkerson v. State*, 401 So.2d 1110, 1112 (Fla. 1981) (rejecting vagueness challenge to term "unnecessarily" in Florida's animal cruelty law).

The balance of the Hialeah ordinances properly are read as making clear that the exemptions for ritual slaughter under both state law and city ordinance 87-40 did not authorize the ritualistic sacrifice of animals or the slaughter of animals in locations not zoned for that purpose. Against all of these provisions, Petitioners argue that reference to the term "ritual" as well as "sacrifice" connotes inherently religious conduct, thus rendering the ordinances non-neutral.

The evidence at trial, however, established and district court found that animal "sacrifices" also occur in

secular "ritual[s] or ceremonies", 723 F. Supp. at 1484 & n.53, which are not constitutionally protected. Petitioners did not even attempt to argue that the ordinances would be unconstitutional if applied to sacrifices of animals for non-religious purposes. 723 F. Supp. at 1484, n. 53. Petitioners' own expert witness, Dr. Dathorne, testified that many animal sacrifices were the work of deviates from the Santeria faith or practitioners of witchcraft. R-9-299-300. Practitioners of voodoo and satanic "cults" also engage in animal sacrifice. *Id.*

Even if a ban on animal sacrifice primarily burdens those of a particular religious faith, that without more does not render the regulation non-neutral. Oregon's restrictions on peyote ingestion were neutral even though the law, in practice, was said to bear mostly upon the Native Indian religious groups challenging the restriction. *Smith*, 494 U.S. at 619 & n. 7 (Blackmun, J. dissenting). Certainly, legislators were aware that a law outlawing polygamy applied in practice mostly to the Mormons, who were acknowledged to be the primary, if not sole, practitioners of polygamy in Utah. See *Reynolds v. United States*, 98 U.S. at 164-66. The effect of the statute should not be the yardstick by which neutrality is measured.

The language of the ordinances should be definitive. The phrases "sacrifice", "ritual" or "ceremony" in ordinances 87-52 and 87-71 do not specifically target religion. The dictionary definition of ritual includes "a code or system of rites (as of a fraternal society)." *Webster's Third New International Dictionary*, at 1961 (1976). The primary definition of ceremony is "a formal act or series of acts typically conducted elaborately, solemnly, and as prescribed by the ritual or protocol of religious, state, courtly, social or tribal procedure." *Id.* at 366.

Thus, neither "ritual" nor "ceremony" is synonymous with religion, although each may include religious conduct. This Court has upheld a state law preventing polygamists from voting or holding public office, notwithstanding that polygamist was defined as a member of any "order" who advocates polygamy as either a "rite or ceremony of such order." *Davis v. Beason*, 133 U.S. 333 (1890). More recently, a federal district court has held that "ritual" is not synonymous with "religious" in discussing the meaning of the ritual slaughter exception in the Federal Humane Slaughter Act. See *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974).

Furthermore, use of specific terms such as "sacrifice" and "ritual or ceremony" eliminate any confusion as to the intended reach of the ordinance. This serves the laudable purpose of placing residents of the City on notice of the prohibited conduct. The failure of the City to act clearly would invite vagueness challenges to the ordinances under the due process clause. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-99 (1982); *Smith v. Goguen*, 415 U.S. 566, 576 (1974).

With these definitions and principles in mind, the remaining three Hialeah ordinances are clearly neutral laws of general applicability. Ordinance 87-52 broadly states that "no person" shall "possess, sacrifice or slaughter" one of a list of enumerated farm animals intending to use such an animal for food purposes. Licensed establishments in areas zoned for slaughterhouses are excluded from the ban. Ord. 87-52, § 6-9(3). The killing, slaughter or sacrifice of an animal by "any group or individual" is proscribed, regardless of whether the flesh is to be consumed. Ord. 87-52, § 6-9(2). As the District Court found, Ordinance 87-52 acts "as

a blanket and facially neutral prohibition on the killing of animals by anyone for any reason, except in slaughterhouses." 723 F. Supp. at 1484.

Ordinance 87-52 does not single out persons engaged in the religious sacrifice of animals but, instead, merely puts such persons on notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter done in slaughterhouses. *Id.*

Petitioners finally claim that Ordinance 87-52 is unconstitutional because kosher slaughter is exempt from its prohibitions. The Hialeah ordinance does not exempt kosher slaughter, it exempts any ritual slaughter which comports with the Federal Humane Slaughter Act, 7 U.S.C. § 1901 *et seq.* (1992) and its Florida counterpart, Fla. Stat. § 828 (1992) *et seq.* Practitioners of Santeria and Judaism alike are free to slaughter animals in a ritualistic manner which comports with Federal law and local zoning regulations. Conversely, Hialeah's ordinances do not permit Jews to conduct kosher slaughter throughout the homes and streets of Hialeah.

Ordinance 87-72 deals only with slaughter, not sacrifice. The Ordinance makes it unlawful for any person, corporation or association to slaughter any animals within the city limits except on premises properly zoned as a slaughterhouse and meeting the requisite health, safety, and sanitation codes. Slaughter of animals by all persons whether for religious or secular reasons is equally regulated. If this provision is not neutral, then presumably Hialeah's entire zoning code would be considered discriminatory.

Petitioners challenge Ordinance 87-72 on preemption grounds. State preemption issues were not raised in the

court of appeals. Federal preemption issues were not raised in the complaint or tried in the district court. Neither state nor federal preemption claims were raised in the Petition for Certiorari. There is no reason for this Court to consider these issues.^{7/}

Considered together, Ordinances 87-52 and Ordinance 87-72 are "first and foremost zoning ordinances". 723 F. Supp. at 1481. The City's zoning ordinances, like any other "neutral, generally applicable" regulatory law", may be

^{7/} Petitioners contend that Ordinance 87-72 is not applicable to their conduct because it defines "slaughter" to mean "a killing of animals for food". Although "sacrifice" and "slaughter" are defined differently, the definitions are not mutually exclusive. "Slaughter" is the "killing of animals for food", while "sacrifice" is the killing of animals "not for the primary purpose of food consumption." The "sacrifice" of an animal which is consumed also constitutes "slaughter." That the primary purpose of killing an animal which is eaten is not for food does not mean that an animal which is "sacrifice[d]" and eventually eaten is "not killed for food."

Petitioners argue that Ordinance 87-72 is preempted by Florida statutes regulating ritual slaughter. Ordinance 87-72 is primarily a zoning ordinance which does not regulate how ritual slaughter is performed, but rather where it may take place. 723 F. Supp. at 1480. Local communities may freely exercise their zoning powers to exclude slaughterhouses. See, e.g., *The Slaughterhouse Cases*, 16 Wall (83 U.S.) 36, 21 L.Ed. 394 (1873). Further, a Florida municipality is authorized to adopt an ordinance relating to animal control or cruelty unless it expressly conflicts with the provisions of Fla. Stat. Chapter 828. As the district court found, the penalty provisions of Ordinance 87-72 do not conflict with any penalty in Chapter 828.

applied constitutionally to religiously motivated conduct without compelling justification. *Smith*, 494 U.S. at 880.^{8/}

Petitioners essentially ignore that two of the ordinances are primarily directed at zoning and do not argue that a municipality violates *Smith* by restricting conduct to a specific location in the municipality. Instead, relying upon *Islamic Center, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988), Petitioners argue that the zoning power may not be used to exclude their Church from "all accessible locations in the city." The City of Hialeah has not "zoned out" a church, it has at most zoned out slaughterhouses.^{9/} More significantly, the exercise of the

^{8/} Two federal appellate courts since *Smith* have considered whether a zoning ordinance violated the First Amendment right to free exercise of religion. See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S.Ct. 1103 (1991) (New York Landmarks Preservation Law which eliminated church's option of raising revenues for purposes of expanding religious charitable activities did not violate First Amendment despite its "drastic" effect on church). In *Cornerstone Bible Church*, the church sued the city claiming that a zoning ordinance which excluded churches and other non-profit entities from the city's commercial and industrial zone violated the church's constitutional rights. 948 F.2d at 466-68. Finding that the ordinance was a general law that applied to all land-use in the city and had not been enforced for an anti-religious purpose, *id.* at 472, the Eighth Circuit held that the ordinance was a neutral law of general applicability under *Smith*, and affirmed an order granting summary judgment against the church. *Id.*

^{9/} Moreover, even a church constitutionally may be precluded from, or restricted to, a particular area by a "neutral, generally applicable" zoning ordinance. See, e.g., *Cornerstone Bible Church*, 948 F.2d at 472. See also *Messiah Baptist Church v. City of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 308-09 (6th Cir.), (continued...)

zoning power as applied to Petitioner Church is not properly part of this case because, as recognized by the district court, the Church did not even seek zoning approval for a slaughterhouse use until immediately before trial.^{10/}

Ordinance 87-71, unlike the primarily zoning ordinances referenced above, prohibits all animal "sacrifice" within the City. It does so even-handedly and while it burdens the ability of certain religions to practice animal sacrifice, it does not restrict religious belief. Nor does the ordinance discriminate among the cults, sects, religions or individuals who conduct sacrificial killings of animals. The district court expressly found that Ordinance 87-71 did not impermissibly target religious conduct, was "neutral", and "at most [had] an effect on Plaintiffs' religious conduct that is incidental to [its] . . . secular purpose and effect." 723 F. Supp. at 1484.

^{9/}(...continued)

cert. denied, 464 U.S. 815 (1983); *Grosz v. City of Miami Beach*, 721 F.2d 729, 738 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

^{10/} All citizens of Hialeah have the right to seek future land use plan amendments pursuant to Code. Hialeah City Code, § 32-5(a). Additionally, Petitioners may apply, if necessary, for a zoning change and/or variance which is not inconsistent with the future land use plan. *Id.*, at § 32-5(11)(c)(1). See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (claim that application of zoning regulations "took" property under Fifth Amendment premature because property owner had not obtained administrative decision).

B. Hialeah Need Not Prohibit All Killing Of Animals In Order To Constitutionally Proscribe Animal Sacrifice

Petitioners correctly assert that neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals. From this unassailable premise, however, Petitioners leap to a most illogical conclusion: that the City must either stop all animal killings or permit sacrifice of animals for religious reasons. This type of argument, essentially maintaining that the ordinances are underinclusive, is unpersuasive. In *Smith*, for example, the Court did not question Oregon's law against peyote use on the grounds that other activities, such as smoking tobacco or drinking alcohol, may also be hazardous to society.

Animal sacrifice is different from hunting, raising cattle, and exterminating bugs. The "killing of animals" is not a homogenous classification wherein all "killings" are similarly situated and must be outlawed or ritualistic killings permitted. The record evidence and findings by the district court demonstrate a host of evils specifically associated with animal sacrifices. 723 F. Supp. at 1471-76. The keeping, killing and disposal of animals in rituals or sacrifices pose health hazards and constitute cruel treatment of animals. These risks are not posed by other types of animal killings. The slaughter of animals in sanitary, regulated, zoned slaughterhouses is not constitutionally similar to the holding, killing and disposing of livestock and fowl by the thousands in homes throughout the community. For this reason, the ordinances are not religious "gerrymanders" which burden Petitioners' religious practice while ignoring constitutionally similar secular practices. See *Gillette v. United States*, 401 U.S. 437, 452 (1971) ("a claim alleging 'gerrymander' must

be able to show the absence of a neutral secular basis for the lines government has drawn").

Furthermore, Petitioners greatly overstate the extent to which other animal killing is legally permissible. Florida's animal cruelty law by its terms applies broadly to cruel and inhumane treatment of animals and has been specifically employed against cockfighting and training greyhounds with rabbits. *See* Op. Fla. Atty. Gen. 90-29 (1990).

To be sure, hunting, raising animals for food, and pest extermination are legally permitted in Florida as they undoubtedly are in every state in the Union. The reasons for permitting these activities which take animal lives are so self-evident as to require little if any description. Hunting and cultivation of animals for food is important to the propagation of the human species. The eradication of insects and pests is obviously justified both for protecting the food chain and controlling the spread of disease. Euthanasia, which must be administered in a painless fashion in regulated conditions, Fla. Stat. § 828.058 (Supp. 1992), prevents the running wild of exorbitant numbers of cats and dogs and other animals, which in turn makes sense in protecting the community from the health and safety problems inherent in large numbers of animals on the loose.

Even if the Court were of the view that certain lawful practices are cruel to animals -- the boiling alive of lobsters, perhaps -- there is no requirement that the City address all problems at the same time. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ("Legislature may select one phase of one field and apply a remedy there, neglecting the others."); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935). ("The state was

not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way.")

C. The Ordinances Were Not Intended to Discriminate Against Religious Belief

The district court specifically considered and rejected Petitioners' contention that the City intended to suppress Santeria. 723 F. Supp. at 1479. The district court stated:

There was no evidence to support this contention. All the evidence established was that the council members' intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals, including animal sacrifice, the council's intent was to stop animal sacrifice whatever individual religion or cult it was practiced by.

723 F. Supp. at 1479 (emphasis added).

Petitioners ignore this language and instead seize upon and misconstrue two statements in the district court's twenty-one (21) page opinion as a finding that the ordinances are not religiously neutral. First, Petitioners argue that the lower court concluded that the ordinances were valid "even if the use of the words 'ritual' and 'ceremony' are understood as targeting primarily religious

conduct." 723 F. Supp. at 84. The district court expressly found, however, that use of the phrases "ritual or ceremony" did not impermissibly target religious conduct. *Id.*

Second, the district court did not state that government could target religion because "[s]trict religious 'neutrality' is not required by the First Amendment." The lower court was referring to religious neutrality in the same sense as Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985) (concurring), and expressly cited her concurring opinion. 723 F. Supp. at 1484. The lower court, like Justice O'Connor, used religious *neutrality* to refer to the fact that government action often benefits or burdens religious exercise, and thus is not strictly neutral toward religion. This use of religious *neutrality* became the law of the land in *Smith*. Thus, the District Court's language should not be confused as a finding that the City intended that the ordinances discriminate against Santeria or, for that matter, against religion, a position that the lower court clearly and emphatically rejected. See 723 F. Supp. at 1484.

Discriminatory intent is not established by Petitioners quoting religiously intemperate remarks made at a city council meeting. Statements during debates or hearings which are made by persons who are not responsible for preparing or drafting the law are entitled to little weight regarding the intent of the legislation. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 & n. 24 (1975). See also *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . ."). Moreover, contrary to petitioners' assertion, the four ordinances in question were not even passed at this meeting.

In a free country, the privilege of expressing various views -- including views repugnant to the Constitution -- is enjoyed by all. One cannot, therefore, ascribe the sentiments expressed by members of the public or even individual councilmen to the City itself. *Washington v. Davis*, 426 U.S. 229, 249, 256 (1970). The best evidence of intent is the ordinances' text. See *West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1990). Judicial speculation as to legislative motive should not be a basis for striking down an ordinance. *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984); *Palmer v. Thompson*, 402 U.S. 217, 224-26, 229 (1971).

If extrinsic evidence of legislative intent were to be considered, there is evidence in the record which demonstrates that the City of Hialeah acted to regulate conduct, not to discriminate against Petitioners' religion. Richard Gross, the Hialeah assistant city attorney who drafted the ordinances (R-15-1337-38), testified regarding the nondiscriminatory reasons for enacting the ordinances. Gross specifically testified that the ordinances were drafted to regulate animal sacrifice, not to discriminate against Petitioners, because of the problems attendant with animal sacrifice. R-15-1357-58. Gross further testified that the City Council heard testimony about animal sacrifice not only in Hialeah, but throughout Dade and Broward Counties, Florida and the Southeastern United States. R-15-1356-57. In addition, one of the ordinances, No. 87-52, was taken from a model ordinance drafted by the Humane Society. R-10-479.

The ordinances are not unconstitutional because Petitioners' religiously-motivated practices brought animal sacrifice to the City Council's attention. Legislative action is not required to take place against a backdrop of

ignorance. For example, in *Reynolds v. United States*, 98 U.S. 145 (1878), the Court upheld the Anti-Bigamy Act of 1862, notwithstanding the fact that its prohibition against polygamy was prompted by the practices of the Mormon Church. A number of courts have sustained against First Amendment challenge provisions outlawing the handling of snakes in churches -- provisions which were adopted against a backdrop of fundamentalist snake-handling practices which were clearly religious in nature. See *State v. Massey*, 229 N.C. 534, 51 S.E.2d 179 (N.C.), *appeal dismissed*, *Brown v. North Carolina*, 336 U.S. 942 (1949) (legislative judgment upholding snake-handling on the grounds that it may endanger the life or health of any person); *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (Ky. 1942). Obviously, a legislative body could not properly do its democratic duty without information about local practices. To require otherwise would force a legislative body to operate in a vacuum. Hialeah's action must be viewed as having been taken not because of the religious nature of much animal sacrifice, but despite that fact.

D. An Exemption For Religiously-motivated Animal Sacrifice Is Not Constitutionally Required

Petitioners further suggest the City's zoning ordinances are subject to stringent review under *Smith* and require a religious exemption because their effect on religion is "dominant". However, whether an ordinance is constitutional cannot depend upon the effect of the ordinances on Petitioners' religious conduct. In *Smith*, for example, Oregon's criminalization of the use of peyote under Petitioners' reasoning had a "dominant" effect on religious practice because its use was "central" to the Native

Indians' religion. *Smith*, 494 at U.S. 886-88. Indeed, Justice Blackmun in dissent noted that there may have been little trafficking and non-religious use of peyote other than by Native Indians. *Smith*, 494 U.S. at 916 & n. 7. Nevertheless, the Court in *Smith* directly rejected Petitioners' suggestion and held that the enforcement of a generally applicable prohibition of socially harmful conduct could not depend on the centrality of the conduct to the actor's religion. *Smith*, 494 U.S. at 885 & n. 2.

Relying upon the unemployment compensation cases beginning in *Sherbert v. Verner*, 374 U.S. 398 (1963), Petitioners suggest that *Smith* holds that religious motives must be included among legally permissible motives if the legality of a regulated act depends upon the actor's motives. The legality of animal "sacrifice" in Hialeah does not depend upon the actor's motives: its ordinances prohibit animal "sacrifice" by all persons regardless of motive. Moreover, the Court in *Smith* specifically rejected this argument in distinguishing *Sherbert* and its progeny of unemployment compensation decisions. The *Sherbert* balancing test was held to be limited to the unemployment compensation benefits cases in which it arose, and cases where other constitutionally protected rights were also implicated. *Smith*, 494 U.S. at 883-85. *Sherbert* is simply inapplicable to this case.

II. HIALEAH'S ORDINANCES ARE SUPPORTED BY COMPELLING GOVERNMENTAL INTERESTS

A. Regulating the Keeping, Killing and Disposal of Thousands of Animals Throughout the Streets and Homes of an Urban Community is a Compelling Governmental Interest

The significance of *Smith* is that a "neutral, generally applicable" law need not be justified by a compelling governmental interest, notwithstanding any "incidental" burden upon religious practice. *Smith*, 494 U.S. at 882-89. Inasmuch as Hialeah's ordinances in their totality satisfy this neutrality standard, no compelling state interests need be established to justify them. Nonetheless, even if such a showing were required because the ordinances were not strictly neutral, the City submits that demonstrable compelling interests abound.

Because the District Court rendered its decision before *Smith* was decided by the Court,^{11/} it applied the compelling interest test that prevailed in the Eleventh Circuit and balanced the competing governmental and religious interests. 723 F. Supp. at 1487. See *Grosz v. City of Miami Beach, Florida*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984). The district court found that the ordinances were justified by "[c]ompelling governmental interests, including public health and safety and animal welfare." 723 F. Supp. at 1486.

^{11/} The district court cited the first decision in *Smith*, 485 U.S. 660, 671 (1988),⁶ which remanded the case to the state court for clarification, but the district court rendered its decision before this Court's second decision in *Smith*.

The City has compelling governmental public health interests in regulating the possession, killing and disposal of thousands of animals. Moreover, the City also has a compelling interest to regulate against animal cruelty.

The district court properly held that the City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the City not zoned for slaughterhouse use. 723 F. Supp. at 1486. All local governments have broad power to zone and control land-use as an essential aspect of achieving a satisfactory quality of community life. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981). A local government may enact zoning ordinances pursuant to its inherent police power to regulate land-use, even if such zoning ordinances impact upon religious activity. See, e.g., *Cornerstone Bible Church*, 948 F.2d at 472; *St. Bartholomew's Church*, 914 F.2d at 355-56.

Under its inherent police power, the City had the right and duty to citizens throughout Hialeah to enact zoning ordinances which restricted all slaughter of animals to areas zoned for slaughterhouses. Certainly, the problems attendant to wide scale killing of animals render it conduct which properly may be subject to restrictive zoning. This Court has recognized that "it is both the right and the duty of the legislative body to prescribe and determine the localities where the business of slaughtering . . . may be conducted . . . it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else." *The Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36, 59 (1872).

The City's interest in zoning is particularly compelling in this case. Petitioners seek to sacrifice animals in their Church, private homes and residences wherever located throughout Hialeah. The uncontroverted evidence established that in South Florida practitioners of Petitioner's religion sacrifice a minimum of 12,000 to 18,000 animals a year in initiation rites alone. 723 F. Supp. at 1473 n. 22. These sacrifices result in public health issues that are subject to the inherent police power to isolate such killings from the rest of the community. Certainly, the City has a high interest in insuring the quality of life in Hialeah and regulating wide-scale animal sacrifice and disposal of animal remains in public places. Cf. *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985) (recognizing "high" interest in protecting public health).

Although Petitioners suggest that their religious sacrifice of animals does not present the same problems as secular slaughter in slaughterhouses, they do not explain the alleged difference other than their religious motivation and the alleged smaller numbers of animals slaughtered. Neither the religious motivation nor the speculative discrepancy in the number of animals slaughtered renders the City's interest less than compelling. A zoning decision must be accorded considerable deference because it is a valid and necessary exercise of police power. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4, 8 (1974).

Petitioners have suggested that their religious practice of sacrificing animals has been zoned out of the City because no existing provision of law permits a slaughterhouse within the City limits. This argument is nothing more than a thinly veiled appellate attack on the constitutionality of the City's zoning plan. It appears to be bottomed on the assertion, although not raised or litigated

below, that Petitioners were entitled to obtain, but were not granted, a variance from the existing zoning laws so as to permit animal sacrifices at a location within the City.

The record in this case precludes raising this claim for the first time on appeal. The District Court specifically noted that Petitioners had not pursued any constitutional claim applicable to this zoning issue. 723 F. Supp. at 1479. Although Petitioners filed an application for a zoning variance to conduct animal sacrifices at a church with the City, such application was not pursued and applicable administrative remedies were not exhausted.

B. Minimizing the Hazards to Public Health Associated with Animal Sacrifices Is a Compelling Governmental Interest

The activities of all individuals, even when religiously-motivated, are subject to regulation by the states in exercising their inherent police power to promote the health, safety, and general welfare. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972). A state's interest in controlling disease to promote the health, safety and general welfare of its citizens is compelling. This Court has observed that the right to practice religion freely does not include liberty to expose the community or the child to communicable disease. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944), this Court found that a Jehovah Witness' religious interest in "street preaching" did not justify the health risk to children in disseminating magazines on the streets. Consistent with this principle, the inherent police power of the state has been held to permit the quarantining or destruction of cattle.

See, e.g., *Johansson v. Board of Animal Health*, 601 F. Supp. 1018 (D. Minn. 1985).

In *Conner v. Carlton*, 223 So.2d 324, 328 (Fla. 1969), appeal dismissed for want of a substantial fed. ques., 396 U.S. 272 (1969), the Florida Supreme Court noted that the state legislature "found that brucellosis disease in domestic animals represents a dangerous subject of 'compelling public interest' sufficient to justify making an exception to the fundamental rule of due process." The state's interest in controlling disease and public and private health are compelling concerns which outweigh any religious conviction of its citizens. See, e.g., *Prince*, 321 U.S. at 166-67; *Smith*, 494 U.S. at 879 (quoting *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (Frankfurter, J.) (1940)). Public health concerns are not simply "legitimate" state interests, they are "compelling".

The evidence established and the district court found that the disposal of animal carcasses in open public places and consumption of uninspected meat created a "real" risk of disease. 723 F. Supp. at 1485; R-11-593-594. A sacrificed animal's remains create a health hazard because the remains attract flies, rats and other animals, R-11-562, 566-67, which may themselves carry and exchange diseases and thus further increase the risk of disease to humans. 723 F. Supp. at 1474-75. Petitioners apparently concede that their animal sacrifices pose "incremental risk" of disease, but argue that the increased risk of disease is not compelling because the district court was not presented with any documented examples of infectious disease originating from a particular carcass or someone getting sick from eating a sacrificed animal. However, government must be permitted to prevent a foreseeable risk of disease before it occurs. "[D]iseases affecting the health of persons . . . do not

necessarily require a showing of their emergent or epidemic effects as a predicate compelling public interest for their summary eradication and control." *Connor v. Carlton*, 223 So.2d at 327.

The jurisprudence authorizing the use of the police power to thwart unacceptable societal risks is not dependent upon proof that the threatened harm has already produced the consequences sought to be avoided by the legislation. To the contrary, the cases recognize that such preventative legislation is appropriate despite evidence that the threatened danger has yet to produce the feared result. See, e.g., *Board of Educ. of Mountain Lakes v. Maas*, 56 N.J. Super. 245, 152 A.2d 394, 403 (N.J. App. 1959), *aff'd*, 31 N.J. 537, 158 A.2d 330 (1960) ("A local board of education need not await an epidemic, or even a single sickness or death, before it decides upon action to protect the public. To hold otherwise would be to destroy prevention as a means of combatting the spread of disease.") In *State ex rel Swann v. Pack*, 527 S.W. 2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976), the court upheld an injunction against the handling of poison snakes as a central part of a religious service despite the testimony that no actual danger was posed.

In this case, the expert testimony at trial was that the health risk posed by Petitioners' animal sacrifices was "real".^{12/} R-11-593-594. Mr. Livingstone, Environmental

^{12/} Despite this evidence of a "real" risk to health, Petitioners further suggest that the health risk created by their animal sacrifices must be minimal because there was no direct evidence of the number of sacrificed animals which were disposed of improperly. Petitioners' reliance upon the testimony of Ms. Zorida Diaz Albertini, Director of Animal Services for Dade County, to support this conclusion is misplaced. *Id.* Ms. Albertini's (continued...)

Administrator for the Dade County Department of Public Health, testified that:

We're talking about proven situations from the literature from the Centers for Disease Control of diseases that I have referenced. They're common in humans all over the country, all over the world today. And it is not just a possibility, you can look through the Centers of Disease Control, go to Jackson Hospital, go to all of the major facilities and they can show you case after case after case of human beings infected by the various diseases that we're just talking about now, so it is not a possibility, it is a real thing.

Id.

The Dade County Department of Public Health receives numerous complaints about dead animals and similar things which pose a threat of spreading disease. Dade County has had many outbreaks of many types of disease from miscellaneous causes. R-11-551-52. Although

¹²/ (...continued)

agency only picks up dead animals which are found in a public right-of-way in Dade County. Thus, except for a goat which was cut in half and found at an intersection in Miami Beach, R-10-378, Ms. Albertini was not responsible for retrieving the remains of sacrificed animals found at railroad tracks, backyards, homes, rivers, palm trees, behind the Dade County Courthouse, and on lawns or on doorsteps. R-10-377-378, R-14-1200, R-10-377. Similarly, her agency was not responsible for retrieving the remains of sacrificed animals which practitioners of Santeria disposed at the base of trees. R-10-378. In summary, Ms. Albertini would not have record of many (if not most) of the animal sacrifices improperly disposed of by Petitioners.

the complaints received by the County Department of Public Health are not classified so as to determine if the source was animal sacrifice, R-11-552, the fact remains that dead animals pose a real threat of disease and Petitioners' animal sacrifices are a substantial source of the threat.

Petitioners' wrongly argue that the state pursues these interests only with respect to religious sacrifice. Local zoning regulations on where animals may be raised, kept and slaughtered apply across the board to secular and religious groups alike. There is no evidence, of record or otherwise, that hunting and fishing raises the public health concerns implicated by animal sacrifice. Petitioners also misconstrue the state statute requiring inspection of commonly sold meat, but exempting individuals who raise and consume their own food. Fla. Stat. § 585.88(1)(a) (1992). The state law only deals with inspection; all individuals must still comply with local zoning laws on where animals may be raised and where they may be slaughtered. Moreover, the state legislative judgment that inspection is not required for individuals who raise and consume their own meat has nothing to do with the public policy interests pursued by Hialeah in these ordinances.

Petitioners attack the City's ordinances on the grounds that they do not employ the "least restrictive means" to address compelling governmental interest. The district court considered and rejected Pichardo's testimony that the Church would follow any reasonable restriction on how the animals are obtained, maintained, sacrifices performed and carcasses disposed of. 723 F. Supp. at 1486. Even Pichardo does not know where practitioners of Santeria live and practice their religion, including how they dispose, at a minimum, 12,000 to 18,000 animal carcasses each year. 723 F. Supp. at 1486. The testimony established that Santeria

practitioners often dispose of carcasses based upon their interpretation of the gods' desire. An ordinance regarding how animals are obtained, maintained, sacrificed and the carcasses disposed of, would be unworkable. 723 F. Supp. at 1486. Thus, there is no alternative to prohibition of animal sacrifices which will protect the public's compelling interest in preserving public health.

Even if such alternatives were workable, they necessarily would "enmesh government in religious affairs." *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. at 395. Entanglement of city and church through "comprehensive measures of surveillance and contacts", *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971), is unconstitutional in its own right. See also *Hernandez v. C.I.R.*, 490 U.S. 680, 696-97 (1989); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985).

Petitioners also claim that the ordinances are not properly tailored. Because animal "sacrifices" are not similar to other forms of permissible animal killings, the two free speech cases cited by Petitioners are factually distinct. In *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 112 S.Ct. 501 (1991), this Court invalidated a content-based financial burden on free speech. The state had no greater interest in compensating crime victims from book royalties than from any of the criminal's other assets. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), this Court struck down a law that forbade the mass media from publishing the names of rape victims, but did not outlaw other manners of disseminating the same information. *Florida Star*, 491 U.S. at 540. There is no argument here that the ordinances fail to effectuate the purposes for which they were adopted.

C. Prevention of Animal Cruelty Is A Compelling Governmental Interest

The district court correctly found that the City had a compelling interest in protecting animals from the cruelty of animal sacrifice. 723 F. Supp. at 1486. As the district court noted in *Humane Society of Rochester v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986), "it has long been the public policy of this country to avoid unnecessary cruelty to animals." "[L]egislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968). Because "[c]ruelty to animals is an offense 'against public morals, which the commission of cruel and barbarous acts tends to corrupt,'" state anti-cruelty "statutes are 'directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts.'" *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 280 (D. Mass. 1986) (citations omitted), *aff'd*, 802 F.2d 440 (1st Cir. 1986).

These cases evidence our nation's present public policy against animal cruelty and the developing law against conduct which is cruel to animals. Congress has recognized animal rights and has established a clear federal policy in favor of the humane treatment of animals by enacting numerous statutes which recognize and protect animal rights. See, e.g., Animal Welfare Act, 7 U.S.C. §§ 2131-2157 (1988); The Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901-1906 (1988); and Marine Mammals Protection Act, 16 U.S.C. §1361-1407 (1988). Every state and territory, as well as the District of Columbia, has

enacted some form of statute extending protection to animals.^{13/} See E. Leavitt, *Animals and Their Legal Rights*, 13-14 (1978). Congress and all state legislatures, therefore, have recognized by their statutes that society has a compelling interest in protecting animals.

Petitioners argue that preventing cruelty to animals is not a compelling interest because state and local authorities tacitly permit practices that may inflict greater and longer-lasting pain on animals. Petitioners fail to cite record evidence to support this assertion. Indeed, many of these alleged practices are regulated by various governmental agencies. See, e.g., 9 C.F.R. § 313 (1987) (federal humane slaughter regulations); Fla. Stat. § 372.001, *et seq.* (1992) (Florida hunting laws). Animal "sacrifice" presents three dimensions of cruelty. The district court found cruel the: (1) method of killing; (2) keeping of animals before sacrifice in filthy, overcrowded conditions without food and water; and (3) perception of both pain and fear during the actual sacrificial ceremony. 723 F. Supp. at 1486-87. Therefore, that the City did not prohibit all animal "killings" does not indicate that Petitioners' sacrifices are not cruel. The three components of animal cruelty identified by the district court are not so similar, let alone identical, to any of the secular contexts identified by Petitioners that the prohibition on animal "sacrifices" also mandates a prohibition on all animal "killings".

^{13/} State legislatures have further enhanced the public policy of protecting animals by granting to private humane societies varying measures of police powers to enforce the anti-cruelty laws. See, e.g., California Corporation Code § 10404 (West 1977) (power to investigate and collect evidence to assist prosecutorial efforts); Florida Statutes §§ 828.03 and 828.073 (1990) (seizure of abused animals, with or without a warrant).

Petitioners complain that no legislature has applied Dr. Fox' "standards" to Kosher slaughterhouses. Dr. Fox did not set forth any "standards" as to how animals should be killed. Instead, Dr. Fox explained why Petitioners' method of sacrifice was neither reliable nor humane. Dr. Fox specifically distinguished the Kosher and Moslem method of slaughter, by which the animal's neck is completely severed, from the method of sacrifice used by Petitioners, by which the animal's neck is jabbed and poked, and found the Kosher and Moslem methods to be more reliable and humane. R-12-887. The evidence established and district court implicitly found that the Petitioners' sacrifices did not satisfy federal and Florida statutes on humane ritual animal slaughter. 723 F. Supp. at 1486. See also 7 U.S.C. § 1902(b) (1988); Fla. Stat. § 828.23(7)(b) (1992). These federal and state provisions apply equally to all religious groups who would engage in ritual slaughter.

Petitioners claim that the City's compelling interest only is to protect animals from cruelty in those cases where the priest does not sever all arteries simultaneously. This argument ignores the cruel and inhumane conditions which the district court expressly found precede the final sacrifice. 723 F. Supp. at 1472-73. Petitioners did not present evidence to rebut these findings and their argument that no government agency attempts to prevent these problems in secular contexts is not established by the record.

Finally, Petitioners callously state that "[a]ll living things must die" and suggest that the amount of cruelty to animals in the process of dying does not justify any protection. The district court specifically found, however, that Petitioners' cruelty to the animals begins long before actual sacrifice. 723 F. Supp. at 1473-74. The duration of Petitioners' animal cruelty is far longer than the "brief

period of consciousness in those cases in which the priest fails to sever all arteries simultaneously" The problem begins with the holding of animals in crowded filthy botanicas, and only culminates with a painful, fearful death.

The inherent cruelty of animal sacrifice cannot be remedied by less restrictive means. Even Pichardo did not know how many people practiced Santeria in the City, where such practitioners resided, how they obtained the animals which were sacrificed, or how the practitioners disposed of the carcasses. 723 F. Supp. at 1486 & n.58. The City could not enforce less restrictive ordinances which permitted but regulated animal sacrifices without locating members of the Santeria Church, constantly monitoring their activities and closely administering the ordinances. Clearly, this would constitute an excessive entanglement with religion and would be unconstitutional. See, e.g., *Hernandez*, 490 U.S. at 696-97; *Aguilar*, 473 U.S. at 414.

The City of Hialeah had far more than an "undifferentiated view or apprehension" of the harms created by community-wide animal sacrifices. Compare *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969), with 723 F. Supp. at 1469-79. The City did not speculate regarding the harms that occur because of community-wide animal sacrifice based upon assumptions. Instead, the City introduced a wealth of evidence regarding the harms to these interests created by wide-scale animal sacrifice throughout the community. 723 F. Supp. at 1469-79.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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July 31, 1992

APPENDIX

BEST AVAILABLE COPY

ORDINANCE NO. 87-40

EMERGENCY ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, ADOPTING FLORIDA STATUTE, CHAPTER 828 "CRUELTY TO ANIMALS" (COPY ATTACHED HERETO AND MADE A PART HEREOF), IN ITS ENTIRETY (RELATING TO ANIMAL CONTROL OR CRUELTY TO ANIMALS), EXCEPT AS TO PENALTY; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HERewith; PROVIDING PENALTY FOR VIOLATION HEREOF; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the citizens of the City Of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and

WHEREAS, Section 828.27, Florida Statutes, provides that "nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter...except as to penalty."

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828 - "Cruelty To Animals" (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

Section 2. Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 3. Penalties.

Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding \$500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

Section 4. Inclusion in Code.

The provisions of this Ordinance shall be included and incorporated in the Code of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

Section 5. Severability Clause.

If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent

jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 6. Effective Date.

This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah.

PASSED and ADOPTED this 9th day of June, 1987.

. . .

ORDINANCE NO. 87-52

ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, AMENDING CHAPTER 6 OF THE CODE OF ORDINANCES OF THE CITY OF HIALEAH, FLORIDA, BY ADDING THERETO TWO (2) NEW SECTIONS TO BE NUMBERED SECTION 6-8 "DEFINITIONS" AND 6-9 "PROHIBITION AGAINST POSSESSION OF ANIMALS FOR SLAUGHTER OR SACRIFICE"; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH, PROVIDING PENALTY FOR VIOLATION HEREOF; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida; and

WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; and

WHEREAS, the City of Hialeah, Florida, has enacted an ordinance (Ordinance No. 87-40), mirroring the state law prohibiting cruelty to animals.

WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 "Definitions" and 6-9 "Prohibition Against Possession Of Animals For Slaughter Or Sacrifice", which is to read as follows:

Section 6-8. Definitions

1. Animal - any living dumb creature.
2. Sacrifice - to unnecessarily kill, torment, torture, or mutilate an animal in a public or private

ritual or ceremony not for the primary purpose of food consumption.

3. Slaughter - the killing of animals for food.

Section 6-9. Prohibition Against Possession Of Animals For Slaughter Or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

Section 2. Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 3. Penalties.

Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding \$500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

Section 4. Inclusion in Code.

The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

Section 5. Severability Clause.

If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 6. Effective Date.

This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah.

PASSED and ADOPTED this 8th day of September, 1987.

ORDINANCE NO. 87-71

ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, PROHIBITING THE SACRIFICING OF ANIMALS UPON ANY PREMISES IN THE CITY OF HIALEAH, FLORIDA; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH, PROVIDING PENALTY FOR VIOLATION HEREOF; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community; and

WHEREAS, the City Council of the City of Hialeah, Florida, desires to have qualified societies or corporations organized under the laws of the State of Florida, to be authorized to investigate and prosecute any violation(s) of the ordinance herein after set forth, and for the registration of the agents of said societies.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

Section 2. For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

Section 4. All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosecution of any violations of this Ordinance.

Section 5. Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

Section 6. Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 7. Penalties.

Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding \$500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

Section 8. Inclusion in Code.

The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

Section 9. Severability Clause.

If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance.

Section 10. This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah.

PASSED and ADOPTED this 22nd day of September, 1987.

ORDINANCE NO. 87-72

ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, PROHIBITING THE SLAUGHTERING OF ANIMALS UPON ANY PREMISES IN THE CITY OF HIALEAH, FLORIDA, EXCEPT THOSE PREMISES PROPERLY ZONED AS A SLAUGHTER HOUSE; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH, PROVIDING PENALTY FOR VIOLATION HEREOF; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A SEVERABILITY CLAUSE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

Section 2. For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

Section 4. All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosecution of any violations of this Ordinance.

Section 5. Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

Section 6. This Ordinance shall not apply to any person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

Section 7. Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 8. Penalties.

Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding \$500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

Section 9. Inclusion in Code.

The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

Section 10. Severability Clause.

If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 11. Effective Date.

This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah.

PASSED and ADOPTED this 22nd day of September, 1987.

. . .

Hialeah City Code

Sec. 32-5

Zoning Changes and Land Use Plan Amendments

- (a) **Procedures for Amendments to Future Land Use Plan.** From and after the date of the adoption of this section, future land use plan amendments shall be considered only on a twice annual basis in accordance with the following procedural calendar and regulations:
- (1) Property owners or their authorized representatives, who possess written authorization, shall be the only eligible applicants for future land use plan amendments other than the city itself, through its planning division.
 - (2) During the first week of November and May of each year the city shall cause to be published, a block ad notice of its intention to accept applications for amendments to the future land

use plan element of the city's comprehensive plan.

- (3) Applications shall be received by the City from January 1 through January 31 for the November cycle and from July 1 through July 31 for the May cycle in such form and in such numbers as determined by the planning division and as made available to the applicants at the time of the city's publication of its notice of intention to accept applications.
- (4) Planning division staff shall review all submitted applications for future land use plan amendments during February and March for the November cycle and during August and September for the May cycle and shall prepare a comprehensive written recommendation with respect to each application, including any initiated by the city itself.
- (5) On the first Wednesday of April for the November cycle and the first Wednesday of October for the May cycle the planning and zoning board shall hold a public hearing to consider applications for amendments to the future land use plan and shall upon conclusion of the public hearing make a recommendation to the city council with respect to each application.
- (6) On the first Tuesday of May for the November cycle and the third Tuesday of November for the May cycle the city council shall hold a public hearing to consider the recommendations

of the planning and zoning board with respect to applications for amendments to the future land use plan and shall, upon conclusion of the public hearing, adopt, by a 5/7ths vote of the council, a resolution adopting those proposed amendments to the future land use plan that it considers to be in the best interest of the residents property owners and the citizens of the City of Hialeah.

- (7) Upon adoption of the council resolution, the proposed amendments to the future land use plan shall be forwarded to the appropriate county regional and state agencies for review and comment and shall thereafter be adopted in accordance with the provisions of Florida Statutes, Section 163.3184.
- (8) During the first May review and amendment process (1987) the following deviation in the normal schedule shall apply.

8.1. Notification of intention to accept applications: June.
- (9) An applicant for a land use amendment, prior to his/her application being accepted, shall post, on his property, at his expense, a sign notifying the public of his intent to seek a land use amendment. Said sign shall be posted in the same manner as that provided for zoning amendments, governed by code section 32-5(c)(1).

- (10) An applicant for a land use amendment shall, at the applicant's expense, prepare for and provide to the city a radius map and a property ownership list in the same form as that required for a zoning change; as governed by Chapter section 118(a) and Code section 32-5(c)(3).
- (11) Property owners within a three hundred seventy-five foot radius of property for which land use plan is sought to be amended shall be notified of such amendment application, by mail, in addition to any statutorily required notice. The applicant shall bear the costs of notification to all the property owners within said three hundred seventy-five foot radius.

(b) **Zoning to conform to land use.**

- (1) Within one hundred twenty (120) days of the effective date of this section, planning staff shall, as intended by Florida Statutes, Section 163.3201, proceed to initiate rezoning of all properties in the city that are presently inconsistent with the future land use plan, to make it consistent with the future land use plan.
- (2) Within ninety (90) days of the adoption of an amendment to the future land use plan, the applicant for each such amendment shall submit an application to rezone the subject property consistent with the future land use plan. If the applicant fails to proceed to apply to rezone said property, then the city may, on its own initiation proceed with the rezoning application.

(c) **Applications for zoning changes, variances, and board of adjustment actions not inconsistent with the future land use plan.**

- (1) An application for a zoning change and/or variance not inconsistent with the future land use plan will not be processed until the applicant has posted a sign in a conspicuous place on any street abutting the property for which the zoning change and/or variance is sought. The city shall supply such sign or signs which shall be a minimum of fourteen (14) inches by twenty-two (22) inches in size. The cost of such sign and/or signs is to be paid for by the applicant. Said applicant shall sign an affidavit setting forth that said sign or signs have been posted on the property as required by this subsection before the application for a zoning change and/or variance shall be processed.
- (2) All relevant portions of the Charter of the City of Hialeah shall continue to govern applications for zoning changes and/or variances that are not inconsistent with the future land use plan.
- (3) All applications, signature petitions and radius maps prepared for any zoning changes or variances shall bear the signature of the preparer of such radius maps, applications and signature petitions and shall further contain an affirmation as to the authenticity/accuracy of the signatures, legal descriptions, and other information contained therein. Radius maps under this provision shall be prepared by a

registered land surveyor or other individual with a state regulated seal.

- (4) The application for a hearing before the board of adjustment shall be accompanied by a survey by a registered land surveyor no more than six (6) months prior to the date of the application and certified by the applicant to be correct.

(d) Fees.

- (1) Each applicant for an amendment to the future land use plan shall pay to the City of Hialeah the sum of two hundred (\$200.00) for each one-fifth acre of each parcel of land (up to a maximum of five hundred dollars (\$500.00)) for which an amendment to the future land use plan is sought. For purposes of this paragraph, the term parcel shall be deemed to mean "a property or contiguous properties all under the same ownership and for which the same amendment is sought."
- (2) Every person applying for change of zoning, which change is consistent with the land use plan, shall pay the sum of two hundred dollars (\$200.00) upon making application for such rezoning with the planning and zoning department to defray the cost thereof. This fee also applies to applications for variance permits.
- (3) The fee charge for a board of adjustment hearing shall be the sum of one hundred dollars (\$100.00).

- (4) The fees in paragraphs (2) and (3) above shall be tripled if a building addition or alteration has been commenced without a building permit and/or prior to the approval of the applied for zoning change, variance, or adjustment, if such zoning change, variance or adjustment is necessary in order to legally permit said building addition or alteration.

- (5) Any one hundred (100) per cent service-connected disabled veteran, upon proof of such disability shall receive a fifty (50) per cent reduction in land use, zoning and board of adjustment fees for an application filed on said disabled veteran's homestead, providing said veteran has owned said homestead property according to the public records of Dade County, Florida, for a period of at least two (2) years prior to the date of the application for said land use [amendment], zoning [change] and/or board of adjustment [hearing].

...

Chapter 828.12, Florida Statutes

Cruelty to Animals

- (1) A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first

degree, punishable as provided in s. 775.082 or by a fine of not more than \$5,000, or both.

(2) A person who tortures any animal with intent to inflict intense pain, serious physical injury, or death upon the animal is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than \$10,000, or both.

AUG 28 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,
and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PARTIES TO THE PROCEEDING

All parties are named in the caption of the case. The Church of the Lukumi Babalu Aye, Inc. has no parent corporations or subsidiaries.

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ARGUMENT

The key points that control this case are few and clear. These points recur throughout the details necessary to a thorough analysis of the City's multiple ordinances and alleged compelling interests.

Government cannot regulate religion, except as the incidental effect of generally applicable laws. These ordinances single out religion for regulation that does not apply to the same acts when conducted for secular reasons. The City concedes that it has no generally applicable ban on killing animals. City Br. 21.

If these ordinances can be justified at all, it is only by proof that discrimination against religion is the least restrictive means to serve a compelling interest. But none of the City's alleged interests is compelling, and none is unique to religion. The City has forbidden a religious ritual, but it does not forbid secular conduct that causes the same harms.

The City opens its brief by charging that petitioners "misrepresent several critical findings of the district court." City Br. 2. The alleged misrepresentations involve nothing more than disagreements about the legal significance of findings and conclusions that both sides quote or describe in almost identical terms. But the City's own carelessness with authorities and the record extends even to omitting critical words from its quotation of one of the ordinances, see *infra* at 9-10, and to a wholly false claim that three of the ordinances were not challenged below, see *infra* at 12-13 & n.8. These disagreements will be considered at the relevant points in this brief.

I. THE ORDINANCES DISCRIMINATE AGAINST RELIGION.

A. Laws That Burden Religious Exercise Must Be Neutral and Generally Applicable.

The City believes that it may "select one phase of one field and apply a remedy there, neglecting the others,"

even if the one field it regulates is religion. City Br. 22, quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), and citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935). *Lee Optical* is the classic casebook example of total judicial deference to economic regulation. The City thinks that discriminating between the religious and the secular is just like imposing different regulation on optometrists and opticians, or on dentists and physicians.

The City finds it "most illogical" that it cannot forbid religious killings of animals while permitting secular killings of animals. City Br. 21. Hialeah claims that it can define offenses in religious terms, *id.* at 16, enact a law that "primarily burdens those of a particular religious faith," *id.* at 15, 26-27, enact such a law in direct response to religious conduct, *id.* at 25-26, and distinguish lawful from unlawful conduct on the basis of the religious or secular motive for engaging in the conduct, *id.* at 27 (sentence beginning "Moreover,"), and that all these elements in combination are consistent with its duty of neutrality toward religion.

The City incorrectly claims that "*Smith* specifically rejected" the rule "that religious motives must be included among legally permissible motives if the legality of a regulated act depends upon the actor's motives." City Br. 27, citing 494 U.S. at 883-85, with no reference to any specific language. To the contrary, *Smith* repeatedly reaffirms that the illegality of conduct cannot depend on the actor's religious motivations. The state may not ban acts "only when they are engaged in for religious reasons." *Id.* at 877. If regulation depends upon "individualized governmental assessment of the reasons for the relevant conduct," then the state has "a system of individual exemptions, [and] it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884.

B. These Ordinances Are Neither Neutral Nor Generally Applicable.

1. The Discriminatory Pattern Common To All The Ordinances.

a. Discrimination Against Religious Reasons For Killing Animals. Hialeah concedes "that neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." City Br. 21. But if the ordinances burden religion and are not generally applicable, they must be justified by a compelling interest. *Smith*, 494 U.S. at 884.

The City offers two sets of reasons for distinguishing religious killings from secular killings. First, the City says that there are "evils specifically associated with animal sacrifices." City Br. 21. This is not a neutrality argument; this is a compelling interest argument. By offering the alleged evils of animal sacrifice to show the neutrality of the ordinances, the City is attempting to escape from the compelling interest standard to the *Lee Optical* standard. The City in effect says that if it asserts a reason for discriminating against religion, the discriminatory ordinances are neutral, judicial review comes to an end, and the City need never show that its alleged reason justifies the restriction on religion. We will consider the City's alleged evils in their proper place, with the compelling interest arguments.

The City's second reason for distinguishing secular from religious killings of animals is even more revealing. The City finds it "self-evident" that secular killings of animals are important. City Br. 22. Hunting is "important;" exterminating pests is "justified;" reducing the population of dogs and cats "makes sense." *Id.* Presumably the new statutory exemption authorizing pet stores to feed warm-blooded animals to pets, §828.065 (Supp. 1992), also serves an important purpose in the City's view. But religious killings of animals are not "necessary." City Br. 14.

Here we get the essence of petitioners' case in the

City's own words. The City's concern for animal welfare is easily overridden. Animals may be killed for any reason that "makes sense" to the City. Not surprisingly, human interests and needs are far more important to the City than animal interests and needs. The problem is that religion does not count as a human need in Hialeah.¹

The scope of these ordinances, as well as the history of their enactment, is wholly unlike the statute in *Smith*. The Oregon drug laws forbade a long list of drugs to every citizen in the state. Peyote fell naturally within the broad class defined by the statute; there was no hint of a gerrymander to "get" peyote worship. Even the narrow exception for medical use did not apply to peyote, because peyote is a Schedule I drug, and part of the definition of Schedule I drugs is that they have "no currently accepted medical use in treatment in the United States." 21 U.S.C. §812(b)(1)(B) (1988).

The City says that *Smith* implicitly approves a less rigorous policy of nondiscrimination, because it permitted Oregon to ban peyote while permitting tobacco. City Br. 10. But that issue was not presented to the Court in *Smith*, and it is not remotely analogous to this case. To argue that a broad statutory class could have been defined even more broadly is not at all the same as arguing that out of a broad range of reasons for killing animals, Hialeah has prohibited only the religious reason. The analogous law in *Smith* would be a law that permitted recreational use of peyote, cooking use of peyote, and ingestion to reduce the surplus quantities of peyote, but banned the ingestion of peyote in a ritual or ceremony.

¹ The City says that unwanted pets may be killed only "in a painless fashion in regulated conditions." City Br. 22, citing Fla. Stat. Ann. §828.058 (Supp. 1992). But §828.058 applies only to animal shelters and similar facilities. §828.058(1)(a). If an owner kills his own unwanted animals, the killing is regulated only by the prohibition on torture in §828.12. Given the explicit statutory authorization for killing unwanted animals, such killings are not "unnecessary" killings.

The trial judge adopted the City's view that the ordinances were justified, and so he said that suppression of religion was "incidental to the ordinances' secular purpose and effect." Pet.App. A40. This was error, as explained below. But the trial judge did not make the further mistake of finding the ordinances neutral. To the contrary, he held that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah . . ." Pet.App. A23. This holding did not trouble the trial judge, because he believed that "Strict religious neutrality is not required by the First Amendment." Pet.App. A40.

The City tries to rehabilitate this reasoning, claiming that the judge treated incidental benefits and burdens of neutral regulation as departures from neutrality. City Br. 24. The City draws this inference from the trial court's citation to Justice O'Connor's concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985). But the City's argument misreads both the trial court and Justice O'Connor, as well as the trial court's other citations for the same point.²

Each of these opinions explained why express religious classifications do not violate the Establishment Clause when they merely relieve religious exercise from state-imposed burdens. Each of these opinions defended laws that expressly and exclusively targeted religious conduct for *exemptions*. This is how the trial judge understood these opinions; he said they hold that government "may take religion into account when necessary to further secular purposes," may enact "laws explicitly mentioning religious conduct so long as they serve a secular purpose," and may grant "explicit religious exemptions." Pet.App. A40. The trial court's mistake was to assume that it is equally permissible to impose explicit religious regulation. But targeted

² *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974).

regulation of religion requires a compelling interest.

The City also defends the neutrality of its ordinances on the basis of the trial court's finding that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." Pet.App. A28, quoted at City Br. 2, 23 and at Pet.Br. 14-15. The City believes it is sufficient that the ordinance would apply to other religions and not to Santeria alone. But it matters little whether the City aimed to suppress one faith or many. The Court took note of this possible misreading of *Smith* in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992): "[A] regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Id.* at 2899 n.14 (emphasis omitted).³

b. The Purpose To Suppress Religion. Given the anti-religious gerrymander in the text of these ordinances, the Court can reverse without drawing an inference of improper purpose. But the purpose to suppress religion remains clear. The trial court found that "the council's intent was to stop animal sacrifice." Pet.App. A28, A23.

The City suggests that legislative motive is irrelevant, citing cases from a variety of other contexts. City Br. 25.⁴

³ The City's charge that petitioners misrepresented the trial court's findings is followed by quotations relating to these questions about the meaning of neutrality and general applicability. City Br. 2. The City does not specify which of these quotations we misrepresented, for the obvious reason that we did not misrepresent any of them. See the City's quotation about stopping animal sacrifice, quoted at Pet.Br. 14-15; compare the City's quotation about zoning to the similar quotation at Pet.Br. 44-45; compare the City's quotation about secular purpose and effect to the discussion of secular interests at Pet.Br. 28-47.

⁴ In *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984), the existence of a secular purpose made it irrelevant to the Establishment Clause whether the City also had a religious purpose. In *Palmer v. Thompson*, 403 U.S. 217 (1971), "the holding was that the city was not overtly or

But this case is controlled by *Smith*, which says that a law requires compelling justification if it forbids acts "only when they are engaged in for religious reasons," 494 U.S. at 877, or if suppression of religion is "the object" of the law, *id.* at 878. The first formulation refers to singling out religion on the face of the statute; the second refers to legislative purpose. This dual standard is clarified by *Smith*'s analogy to *Washington v. Davis*, 426 U.S. 229 (1976). 494 U.S. at 886 n.3. *Davis* reaffirmed the relevance of legislative purpose, whether or not that purpose "appear[s] on the face of the statute." 426 U.S. at 241. The rule was succinctly summarized in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979):

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

Id. at 272 (citations omitted). Similarly under *Smith*, the compelling interest test applies both to laws that draw express religious classifications and to technically neutral laws that are designed to suppress religion. The City's theory appears to be that anti-religious laws must be upheld without inquiry into legislative purpose so long as they do not name the targeted religion in the statutory text. That rule would empower any governmental unit to suppress any

covertly operating segregated pools and was extending identical treatment to both whites and Negroes." *Washington v. Davis*, 426 U.S. 229, 243 (1976). The emphasis on statutory text in *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991), refers to statutory interpretation and not to discriminatory purpose. In any event, the discriminatory purpose here amply appears in the text of the ordinances and resolutions. See Pet.Br. 15. The cited pages of *Washington v. Davis*, 426 U.S. at 249, 256, are wholly irrelevant; perhaps the City meant to cite Justice Stevens' concurrence at 253. As explained in text, *Davis* supports petitioners on the relevance of purpose, as does the concurrence at 254.

minority religion with the most transparent of clever drafting.

2. The Text Of The Ordinances.

a. **Ord. 87-71.** Ord. 87-71 forbids sacrifice, defined as the unnecessary killing of an animal in a ritual or ceremony not for the primary purpose of food consumption. Pet.Br. 15. This ordinance expressly regulates religion, because sacrifice is a religious act. *Id.* at 16-17. The City does not offer a secular definition of sacrifice, but it does argue that animals may be sacrificed in rituals and ceremonies by groups that are not constitutionally protected, offering the examples of voodoo, satanic cults, and witchcraft. City Br. 14-15.

The City offers absolutely no response to what petitioners have already said about these hypothetical secular applications. Pet.Br. 18-20 & n.7. Most important, the logic of *Smith* is that if religious minorities are regulated only by generally applicable laws, they will be protected by the political power of others subject to the same laws. The City does not dispute that this is the only basis on which *Smith* can make sense, and it does not make the absurd argument that a minority religion will be protected by a political alliance with witches, satanists, and voodooists.

The Court in *Smith* said that it "would doubtless be unconstitutional . . . to prohibit bowing down before a golden calf." 494 U.S. at 877-78. It did not matter to the Court that people might bow down before a golden calf for fraternity initiations, theatrical performances, party games, or other imaginative secular reasons, or that the golden calf law might not use the word "religion." But these formalistic distinctions would be dispositive under the City's reasoning.

The limitation to "ritual or ceremony" also indicates the religious focus of Ord. 87-71. The City cites two cases to support its right to regulate rituals. One is miscited, and the

other has been implicitly overruled.⁵ The City's reliance on the discredited decision in *Davis v. Beason*, 133 U.S. 333 (1890), reflects its general view that the Free Exercise Clause is no constraint at all.⁶

b. **Ord. 87-40.** The only part of Ord. 87-40 at issue is the ban on "unnecessary" killings. Pet.Br. 21. The City's defense is either incomprehensible or uncomprehending. The issue is not vagueness, nor whether the City goes on an "ecclesiastical expedition." City Br. 14. The issue is simply that the necessity of animal sacrifice is inherently a religious question. The City's theological judgment is no less forbidden for being ill-considered.

c. **Ord. 87-52.** The City misstates the content of Ord. 87-52. The City says:

The killing, slaughter or sacrifice of an animal by "any group or individual" is proscribed, regardless of whether the flesh is to be consumed. Ord. 87-52, § 6-9(2).

City Br. 16. What the cited section actually says is:

This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of

⁵ *Jones v. Butz* did not hold "that 'ritual' is not synonymous with 'religious.'" City Br. 16. Rather, it held that an exemption for ritual slaughter is permissible because the Establishment Clause does not forbid religious exemptions. 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974). *Davis v. Beason*, 133 U.S. 333 (1890), upheld a test oath that required citizens to swear that they were not members of any organization that advocated polygamy. See *id.* at 335-37. This oath had nothing to do with conduct; it was a pure regulation of association and belief. *Beason* was implicitly overruled in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

⁶ The City also asserts that the trial court "expressly found that Ordinance 87-71 . . . was 'neutral.'" City Br. 20, citing 723 F. Supp. at 1484 (Pet.App. A39-A41). Although "neutral" appears in quotation marks, the opinion never uses that word in connection with Ord. 87-71.

whether or not the flesh or blood of the animal is to be consumed.

Hialeah Code § 6-9(2), set out in Pet.Br.App. A-2 and City Br.App. A-5 (emphasis added).

Without the reference to ritual, and considered in isolation, § 6-9(2) would specifically target sacrifice, but it would add a seemingly general prohibition on killing any animal for any purpose. That is how the City characterizes it. Of course this prohibition would be subject to an exception for the food industry in § 6-9(3), Pet.Br. 23-24, and to a host of exceptions incorporated from state law in Ord. 87-40, but in artificial isolation it would seem to be generally applicable. With the critical language that the City omits, confining the offense to "any type of ritual," this paragraph is just like the other ordinances. If the limitation to ritual did not target religion, the City would not be afraid to quote it.

Ord. 87-71 distinguishes killings "not for the primary purpose of food consumption" from all other killings of animals. Pet.Br. 15. Ord. 87-52 carries the gerrymander further, creating a special rule for killings where food is a purpose but not the primary purpose. See Pet.Br. 23-24. The trial court held that this distinction between primary and secondary purposes exempted Kosher slaughter from the ordinances without exempting Santeria sacrifice. Pet.App. A31. Petitioners argue that the discrimination between Kosher slaughter and Santeria sacrifice is a further reason for invalidating these ordinances. Pet.Br. 24-25.

The City responds with an argument that has no basis in the ordinances or the record. Discussing Ord. 87-52, the City says that "The Hialeah ordinance does not exempt kosher slaughter, it exempts any ritual slaughter which comports with the Federal Humane Slaughter Act" or its Florida equivalent. City Br. 17. No such exemption appears in the text of the ordinance, and the City made no such argument below. The City's argument on pre-emption was the one adopted by the trial court -- that the Humane

Slaughter Acts protect only slaughter and not sacrifice. Br. of Appellee in Ct. App. 46-47. The critical difference between Santeria sacrifice and Kosher slaughter is not in the Humane Slaughter Act, but in the City's distinction between primary and secondary purposes for killing animals and in its hostility to petitioners' religion.

d. Ord. 87-72. Ord. 87-72 forbids the killing of animals for food except in places zoned for slaughterhouses. Pet.Br. 25. The City says many things about Ord. 87-72, but few of them respond to the petitioners' claims. Ord. 87-72 continues and extends the religious gerrymander that runs through all the ordinances, and it was enacted for the very purpose of suppressing sacrifice. Pet.Br. 25-27.

Petitioners argued that the religious gerrymander appears in three ways. First, any attempt to apply the ordinance depends on simultaneous assertion of two inconsistent legal theories -- that sacrifice is slaughter for purposes of applying the ordinance, but that it is not slaughter for purposes of pre-emption. *Id.* at 25-26. The City ignores the argument that this inconsistency shows both religious gerrymander and discriminatory purpose, and instead offers entirely separate arguments that the ordinance applies and that pre-emption issues are not presented here. The ordinance applies because if an animal is killed in a ritual or ceremony not for the primary purpose of food consumption, and then the animal is eaten (so that food consumption must have been a secondary purpose), the killing is both a sacrifice and a slaughter. City Br. 18 n.7. Once again the criminal offense depends not on what petitioners do, but on an elaborate analysis of why they did it. The City's argument supports rather than refutes the claim of religious gerrymander.

The City also says that the pre-emption issues are not presented to this Court. Petitioners agree. But petitioners' decision not to present the pre-emption issues does not entitle the City to defend on the basis of an argument that would require it to assert two inconsistent positions in any

prosecution under the ordinance.⁷

The second indicator of religious gerrymander is that any attempt to apply Ord. 87-72 depends on a misclassification of petitioners' church and even Santeria homes as slaughterhouses. This misclassification depends on the fact that most of the animals are eaten, a purpose that the other ordinances deem secondary. The misclassification is also discriminatory because the City does not subject other killings of animals to slaughterhouse rules. Ord. 87-72 does not apply to veterinarians, humane societies, pet owners, exterminators, and property owners putting out poison, and despite its literal language, there is no reason to believe it will ever be enforced against farmers, fishers, restaurants, or sales of seafood. With respect to lobsters, see Pet.Br. 13.

The third indicator of religious gerrymander is that the ordinance exempts the small-scale slaughter of hogs and cattle, which are not sacrificed, but does not exempt any animals that are sacrificed. Pet.Br. 26-27.

Ignoring the gerrymander, the City argues that Ord. 87-72 is really a zoning law, and that petitioners have not preserved an attack on zoning laws. City Br. 17-20, 30-31. This is preposterous. Petitioners have attacked Ord. 87-72 at every stage; that claim is fully preserved. See J.A. 11, 15. Petitioners have not attacked, and are not now attacking, any provision of Hialeah's zoning code. The site petitioners acquired was properly zoned for church use, Pet.App. A24 n.41, and a certificate of occupancy was issued, Pet.App. A26. Petitioners saw no need for a waiver or variance. If the City thought its zoning laws prevented sacrifice, it would not have enacted the challenged ordinances.⁸

⁷ The City says that "State preemption issues were not raised in the court of appeals." City Br. 17-18. This is incorrect. Appellants' Br. in Ct. App. 53-55. The preservation of error problem is that federal preemption issues were not raised in the trial court. Pet.Br. 38 n.12.

⁸ The City notes that the trial court once characterized three of the

If the City were ever to prosecute, or deny an occupancy permit, on the ground that petitioners were operating a slaughterhouse, the City and petitioners would litigate that issue at that time. The purpose and effect of Ord. 87-72 is to preclude that issue. Petitioners are subjected to slaughterhouse rules even though the deputy city attorney testified that their church would not be a slaughterhouse, Pet.Br. 26, and even though sacrifice has no more in common with slaughterhouses than other killings of animals in the City.

II. THE ORDINANCES ARE NOT JUSTIFIED BY A COMPELLING INTEREST.

A. The Courts Below Applied Erroneous Legal Standards To The Compelling Interest Issues.

"[I]t is the rare case" in which a discriminatory law can be justified by a compelling interest. *Burson v. Freeman*, 112 S.Ct. 1846, 1857 (1992) (plurality); *accord*, *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2550 n.8 (1992). The City's interest must uniquely justify discrimination against religion, Pet.Br. 28-30, and it must be so important that by necessary implication it overrides textually absolute constitutional rights, *id.* at 32-34.

The courts below erroneously equated compelling interests with "legitimate" interests. *Id.* at 31-32. The City makes the same equation, stating that all states have enacted "some form of statute" protecting animals, and that "state legislatures, *therefore*, have recognized by their statutes that

four ordinances as zoning regulations, citing 723 F. Supp. at 1481 (Pet.App. A34), and then it says: "The district court found that Petitioners never sought any relief from *these* zoning ordinances," citing *id.* at 1479 (Pet.App. A29) (emphasis added). City Br. 1-2. This is incorrect. The court did not say that petitioners had not challenged the three ordinances referred to at 1481; he said that petitioners had not challenged "the validity of slaughterhouse zoning regulations that Plaintiffs might encounter."

society has a compelling interest in protecting animals." City Br. 37-38 (emphasis added). The unstated premise is that every statute serves a compelling interest. Elsewhere, the City argues that its interest in zoning is compelling and that zoning laws "must be accorded considerable deference," apparently equating the two standards. *Id.* at 30.

Petitioners also argued that the courts below reversed the burden of proof, repeatedly requiring petitioners to "guarantee" that nothing would ever go wrong in any sacrifice of an animal. Pet.Br. 34-35. The City does not deny this reversal of the burden of proof, and says little to defend it. The City does argue with respect to public health that incremental reduction of risk is without more a compelling interest. City Br. 32-33. The City cites state court cases, and opinions of this Court that did not apply the compelling interest test,⁹ but it does not cite for this proposition a single compelling-interest opinion of this Court.

B. When The Proper Legal Standards Are Applied, It Is Clear That These Ordinances Do Not Serve A Compelling Interest By The Least Restrictive Means.

Application of the compelling interest test presents a question of law to be decided by this Court after an independent examination of the whole record. Pet.Br. 36-37. The City does not dispute this standard of review.

The City's argument consists mostly of a summary of its own evidence below, with only occasional references to petitioners' analysis of that evidence. In broad terms, the City's argument comes to two points. Sacrifice harms animals, and sacrifice produces garbage. But the City does not distinguish this harm to animals from the harm caused by

⁹ *Employment Division v. Smith*, 494 U.S. 872, 879 (1990); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940).

all the other killings of animals, or explain how this garbage is different from any other garbage. The City cannot ban a religion as a step toward more general goals. It cannot use religion as a proxy for other goals even if the goals are legitimate. Where First Amendment rights are at stake, the City must define prohibited conduct in terms of the harm to be prevented.

1. The Harm To Animals.

The parties agree that the trial court found three harms to animals: inadequate care prior to sacrifice, fear prior to sacrifice, and sacrifice itself. Pet. Br. 37-38; City Br. 38.

Inadequate care prior to sacrifice occurs on the botanicas and farms that supply animals for sacrifice. Pet.App. A17-A18. The City says that regulation of these commercial establishments has been ineffective, City Br. 7-8, but they are the most public and visible step in the whole process, and they are entitled to no independent First Amendment protection. Commercial abuses by others are not a reason to suppress petitioners' worship. Pet.Br. 37.

Fear in animals is not at all unique to sacrifice. The City's witness testified that animals experience similar fear in a commercial slaughterhouse or any other strange place. *Id.* Animals obviously experience fear when fleeing from hunters. Because neither the State nor City views these fears as worthy of regulation, fear cannot suddenly become a compelling interest in the case of sacrifice.

With respect to sacrifice itself, the City opens by accusing petitioners of misrepresentation (City Br. 2), and concludes by largely accepting petitioners' characterization of the facts. After carefully analyzing the City's evidence, petitioners concluded: "The City's alleged compelling interest is to protect animals from this brief period of consciousness in those cases in which the priest fails to sever all arteries simultaneously and does not realize that he has failed." Pet.Br. 38. The City quotes this sentence twice. City Br. 39, 39-40. Each time, the City responds that the cruelty begins

before the sacrifice, because of bad conditions in the botanicas. *The City does not argue that the quoted statement mischaracterizes the evidence about the actual sacrifice.*¹⁰

The trial court accepted Dr. Fox's conclusion that this risk of brief consciousness after inadvertent failures makes Santeria sacrifice inhumane. But it is a legal question whether eliminating this very brief and occasional harm is a compelling interest that overrides a constitutional right. Given the many other ways in which animals can be killed under state and local law, and given that few natural deaths occur in seconds or even minutes, it is apparent that this alleged interest is not generally pursued and is not compelling. Pet.Br. 39-40.

2. The Alleged Threat To Public Health.

The City relies on a risk to public health from improper disposal of carcasses by some persons who sacrifice animals. The City ignores the essence of petitioners' argument, based squarely on the testimony of the public health officer, Mr. Livingstone: this is indistinguishable from any other garbage problem. The City quotes Mr. Livingstone's testimony that the risk of disease from garbage is real, City Br. 33, but they ignore his testimony on the same page that "I haven't been speaking of animal sacrifice at all." Pet.Br. 42.¹¹

¹⁰ The paraphrase at City Br. 39, of Dr. Fox's testimony at R12-887, is inaccurate. Dr. Fox did not say that in Kosher and Muslim slaughter "the animal's neck is completely severed." His phrase "across the neck severance" refers to a knife stroke across the neck that severs the carotid arteries. For an unambiguous statement that Jewish law does not require severance of the neck, see Harry Rabinowicz, *Shehitah*, in 14 *Encyclopaedia Judaica* 1338, 1338 (1971). For the rest of Dr. Fox's testimony concerning the Kosher and Santeria knife strokes, see Pet.Br. 40. With respect to the City's charge that we misrepresented the method of killing, we stand on our summary of the evidence, *id.* at 4-5, 38, 40.

¹¹ The City says that "the district court found that the disposal of animal carcasses in open public places and consumption of uninspected meat created a 'real' risk of disease. 723 F. Supp. at 1485; R-11-593-

Petitioners argued that the trial judge erred "because he equated compelling interest with any incremental reduction of risk." Pet.Br. 43. The City responds that an incremental reduction of risk is a compelling interest -- apparently any reduction of risk. City Br. 32. That standard would suspend all constitutional rights and let the City ban anything, for as Mr. Livingstone testified, there is no "activity a human being can engage in without triggering the risk of disease." Pet.Br. 44. The City has singled out this garbage, not because it is especially dangerous, but because it is unfamiliar and because the City does not respect the religious ritual that produces it.

The City claims that it pursues this problem neutrally because it applies zoning regulations to control where animals may be "raised, kept and slaughtered." City Br. 35. There are multiple problems with this argument. These rules do not prevent other killings of animals in the City, by veterinarians, humane societies, exterminators, pet owners, and the like. But sacrifice is wholly banned.

Equally important, the health problem is not about sacrifice, but only about improper disposal. Recall that even a whole carcass can be safely disposed of in a plastic bag and a garbage can. Pet.Br. 43. The City does not ban meat-eating to prevent improper disposal; neither can it ban sacrifice to prevent improper disposal. The City could, of course, ban improper disposal of any animal or meat scraps no matter how or why the animal was killed.

The City tries to show the magnitude of the improper disposal problem by quoting the trial court's finding that 12,000 to 18,000 animals are sacrificed each year in initiations in Dade County. City Br. 5, 30, 35; Pet.App. A15-A16 n.22. About 80% of these animals are chickens, *id.* at A16 n.25, and in the usual course of the ritual, all of these

94." City Br. 32. The word "real" appears in quotation marks, but it does not appear in the district court's discussion of state interests. The quotation is from the testimony of a witness at R11-594.

animals are eaten, *id.* at A16.

In the abstract, 12,000 to 18,000 animals sounds like a large number. But compare it to the finding that there are 50,000 to 60,000 Santeria believers in South Florida. *Id.* at A11 n.14. Animals sacrificed in initiations are a small fraction of an animal per believer per year.¹² Compared to the 1.9 million people in Dade County,¹³ sacrificed animals are less than one percent of a chicken or goat per person per year. This is an infinitesimal fraction of the 253 pounds of per capita annual meat consumption, or of the 5.5 billion chicken broilers produced annually in the United States.¹⁴ The scraps from sacrificed animals are a tiny contribution to the garbage problem in Hialeah.

3. The Alleged Threat To Private Health.

The trial court held that there was a compelling interest in preventing consumption of uninspected meat. The City and State do not pursue this interest with respect to hunters, fishers, or farmers, and there was no evidence that anyone had ever gotten sick from eating meat from sacrificed animals. Pet.Br. 44. Once again, the trial court mistakenly

¹² Using the midpoint of the trial court's ranges, about 55,000 believers sacrifice about 15,000 animals in initiations each year. This would be about 12,000 chickens and about 3,000 other animals, or just over 1/5 of a chicken and 5% of some other animal per believer per year. There is no evidence that adding other rituals would significantly change these fractions. Death and healing rituals involve many fewer animals. Pet. App. A16-A17 & n.26. Perhaps because counsel focused so much attention on the eight-day initiation ritual, the record does not reflect the number of animals in birth, marriage, or annual rituals. The record does show that the annual ritual lasts only one day, and that the animals are eaten. R11-626.

¹³ U.S. Bureau of the Census, *Summary Population and Housing Characteristics: Florida*, Table 1 at 4 (1991).

¹⁴ For meat consumption, see U.S. Dept. of Commerce, *Statistical Abstract of the United States*, Table 1452 at 843 (sum of pork, poultry, beef, and veal); for poultry production, see *id.*, Table 1176 at 673.

equated any incremental risk with a compelling interest. *Id.* The City's only reference to consumption of uninspected meat merely repeats, in a conclusory phrase of a misattributed sentence (see *supra* at 16-17 n.11), that there is a risk. City Br. 32. In its discussion of disposal, the City says that exemptions in the meat inspection laws have "nothing to do with the public policy interests pursued by Hialeah in these ordinances," implying that meat inspection is no longer one of those interests. *Id.* at 35.

4. The Alleged Interest In Zoning.

The City's interest in zoning was an undeveloped afterthought in the trial court's opinion. Pet.App. A45. This afterthought has become a centerpiece of the City's argument. But the City's zoning argument adds nothing to its public health argument. The zoning label does not entitle the City to suppress a minority religion just because the majority does not like it. With or without the zoning label, the City's ordinances are subject to *Smith*. Because the laws are not neutral and generally applicable, they require compelling justification.

Petitioners argued that the City "may not exclude a church from all accessible locations within the city." Pet.Br. 46. The City does not dispute this constitutional rule. The City's only response is that it has not zoned out a church, but that it has zoned out slaughterhouses. City Br. 19.

The City's response is triply mistaken. First, when the City excludes the central ritual of a religion, it has zoned out the church. If the City banned communion wine, it could with equal logic say it had not zoned out Catholic churches, but that it had zoned out taverns. Banning religious worship must be justified by a compelling interest, not by an unreviewable label like tavern or slaughterhouse. Second, there is no evidence that sacrifice is equivalent to slaughterhouses or even that it poses any of the problems of slaughterhouses. The proper comparison is not to slaughterhouses, but to restaurants, grocery stores, and the

homes of meat eaters. Pet.Br. 45. Third, the City does not explain how the ordinances can be zoning laws when they ban sacrifice entirely and do not merely confine it to an appropriate zone. *Id.*

CONCLUSION

The City cannot distinguish animal sacrifice from other killings of animals or other disposal of meat scraps. It forbids sacrifice not because it values animal rights over human rights, but because it places no value on petitioners' free exercise of religion. These ordinances are not neutral and generally applicable, and they are not justified by compelling interests. They violate the Free Exercise Clause as interpreted in *Smith*.

The judgment should be reversed, and the case remanded for entry of a decree enjoining enforcement of the challenged ordinances.

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J. C. GILMAN

In The
Supreme Court of the United States

October Term, 1991

**CHURCH OF THE LUKUMI BABALU AYE, INC. AND
ERNEST PICHARDO,**

Petitioners,

V.

CITY OF HIALEAH,

Respondent.

On Writ Of Certiorari To The United States
Court of Appeals For The Eleventh Circuit

**BRIEF AMICUS CURIAE OF THE RUTHERFORD
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McConnell, <i>Religious Freedom at a Crossroads</i> , 59 U. Chi. L. Rev. 115 (1992)	19

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On Writ Of Certiorari To The United States
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BRIEF AMICUS CURIAE OF THE RUTHERFORD
INSTITUTE IN SUPPORT OF PETITIONERS

STATEMENT OF AMICUS CURIAE¹

This case is about the prevention of invidious discrimination against smaller or more unpopular religious groups. The Framers of the United States Constitution never intended the First Amendment Religion Clauses to be used as a tool to eliminate minority religious groups. Indeed, the First Amendment was created expressly with the idea of insulating these minority groups from governmental regulation and censorship. If the decision below is not reversed by this Court, it will significantly weaken the consideration and caution that the judiciary has historically shown to religious minorities. This

¹ This brief is filed with permission of all the parties. Blanket consents have been filed with the Clerk of this Court.

case could mean the destruction of the freedom of religious persons to worship privately as society now knows it.

Amicus curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-one state chapters, three international chapters, and an international headquarters in Charlottesville, Virginia, *amicus curiae* assists litigants and participates in significant cases relating to the freedom of speech of religious persons. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amicus curiae* in numerous cases before this Court. *Amicus curiae* believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

Amicus does not believe that *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), and its "generally applicable, facially religion-neutral" formulation controls this case. An approach where the judiciary substantially defers to the elected branches of government is "highly threatening to free exercise concerns, especially where members of small, unpopular, or unconventional religions are involved."² *Smith* does not unambiguously represent this Court's definitive adoption of a complete reordering of a body of law that took forty years to develop. Moreover, the demonstrated interests by the Justices of the Court in First Amendment history, solicitude for the role of religion as a mediating institution in culture, fidelity to constitutional text, alertness to how purported "neutrality" can mask hostility, and the conservative instinct to proceed cautiously on a case-by-case basis³ all weigh in against the brash assumption that *Smith* is controlling here.

² Mary Ann Glendon, *Religion & the Court: A New Beginning?*, First Things 21, 24 (March 1992).

³ *Id.* at 25.

The Establishment Clause should not be ignored in this matter, for it prohibits not only discrimination *among* religious groups, but also prevents the political branches of government from invidious discrimination *against* unpopular religious groups and their religious practices.

ARGUMENT

I.

ALTHOUGH THE SMITH CASE CHANGES THE SHERBERT-APPROACH, IT MOST CERTAINLY DOES NOT SUPPLANT THE COMPELLING INTEREST TEST ALTOGETHER.

A. A MUNICIPAL ORDINANCE THAT EXPRESSLY BARS THE RITUAL SLAUGHTER OR SACRIFICE OF ANIMALS IS NOT FACIALLY NEUTRAL AS TO RELIGION.

After making the point that religious *belief* is absolutely protected, the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), turned to the far more common area of disputes concerning the scope of protection for religious *practices*. 494 U.S. at 877. This Court said that legislation would fail the facial-neutrality requirement and thus would merit strict scrutiny if the law prescribed (or proscribed) certain physical acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* Accord *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (discussed *infra* at footnote 11 and accompanying text). For example, said the Court, "[i]t would doubtless be unconstitutional . . . to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." 494 U.S. At 877-878.⁴

⁴ This Court's entire passage reads as follows:

Under this test a law that expressly criminalizes "the consumption of wine" would be constitutional, whereas legislation that prohibits "the sacramental consumption of wine" would be closely examined by the Court under the compelling interest test. Likewise, a municipal ordinance that by its terms prohibits "the slaughter of domestic animals" need only survive rational-basis review, whereas legislation that punishes "the sacrificial slaughter of domestic animals" would receive strict scrutiny in the courts.

Two of the ordinances challenged in this case, *Ord.* 87-71 and *Ord.* 87-52, expressly subject a religious ritual to discriminatory treatment. Moreover, *Ord.* 87-40 enacts Fla. Stat. Ann. ch. 828 as a City ordinance. Sec. 828.12(1) (Supp. 1991), makes it a misdemeanor to "unnecessarily" kill an animal. The City obtained an opinion of the Florida Attorney General to the effect that "unnecessary" killings includes the religious sacrifice of animals. Finally, all four ordinances were enacted for the purpose of suppressing Petitioners' religion, as evidenced by the accompanying resolutions⁵ and the findings below. For example, the District Court found that these ordinances were

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstention only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Smith, 494 U.S. at 877-878.

⁵ The first ordinance, passed as an emergency ordinance, adopted the language of Fla. Stat. 828.02-.25, the Florida anti-cruelty statute, and estab-

"prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals," and that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1479 (S.D. Fla. 1989).

In light of this Court's own reasoning in *Smith*, there is no escaping the conclusion that the lower courts erred in the manner by which they applied the standard of review to the City of Hialeah ordinances that expressly take aim at a religious practice.

lished penalties for its violation. Hialeah, Fla., Ordinance 87-40 (June 9, 1987). The second ordinance prohibited the possession of animals intended for slaughter or sacrifice. It excepted any licensed establishments slaughtering animals for food purposes where such activity is properly zoned and otherwise permitted by state and local law. Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987). The third ordinance prohibited animal sacrifice within Hialeah city limits and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987). The fourth ordinance prohibited the slaughter of animals on any premises within the City of Hialeah, except those properly zoned as slaughterhouses, and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-72 (Sept. 22, 1987).

The City also passed three resolutions concerning animal sacrifice and religious practices in general. The first resolution reiterated the City's "commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Hialeah, Fla., Resolution 87-66 (June 9, 1987). The second resolution established the City's policy opposing the ritual sacrifice of animals and stated the City's intent to prosecute any individual or organization engaging in that practice. Hialeah, Fla., Resolution 87-90 (Aug. 11, 1987). The third resolution set forth the criteria for approval of animal protection associations seeking to register with the City in order "to participate in the investigation and assist in the prosecution of violations of the animal cruelty ordinances." Hialeah, Fla., Resolution 87-109 (Sept. 22, 1987).

(The foregoing was taken from Comment, 45 U. of Miami L. Rev. 1061, 1090 n.239 (1991).)

B. SMITH IS DISTINGUISHABLE ON ITS FACTS AND ON THE BASIS OF THIS COURT'S PRECEDENT.

The City of Hialeah places considerable reliance on *Employment Division v. Smith* and its application of a rational-basis standard of review where the legislation under examination is generally applicable, and facially religion-neutral. The City cites the teachings of *Smith* as if its rule of decision arose *ex nihilo*. Like any complex area of constitutional law, a single case cannot be torn from its larger context.

It is a mistake to believe that *Smith* controls this case. In *Smith*, Justice Scalia traced, *inter alia*, the "generally applicable, facially religion-neutral" standard for assessing a statute under the Free Exercise Clause, to Chief Justice Burger's plurality opinion in *Bowen v. Roy*, 476 U.S. 693, 701-12 (1986) ("Part III" of the opinion, joined by Powell and Rehnquist, JJ.). In turn, the issue that divided the Court in *Roy*, most evident in the exchange between the Chief Justice and Justice O'Connor, 476 U.S. at 724-33 (concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.), is a direct descendent of a dispute between Justice Frankfurter and Justice Brennan that surfaced back in the early 1960's in the case of *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion).⁶ Although dissenting in *Braunfeld*, two years later Justice Brennan eventually prevailed over Frankfurter when Brennan wrote the majority opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963).

Until recently the conventional wisdom had it that *Sherbert* was the foundational case that gave rise to modern doctrinal

⁶ Indeed, the dispute has an even more ancient origin in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Writing for the majority in *Gobitis*, Frankfurter held that children of Jehovah's Witnesses could be expelled from public school for refusal to salute the U.S. flag. *Gobitis* was expressly overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Justice Frankfurter dissented in *Barnette*, *id.* at 653-655, arguing that a generally applicable, facially religion-neutral regulation was constitutional.

analysis under the Free Exercise Clause. Although *Smith* changes the *Sherbert*-approach, it most certainly does not supplant the compelling interest test altogether. A brief overview of the evolution of Free Exercise Clause doctrine will provide a helpful perspective.

1. The Evolution of Modern Free Exercise Clause Doctrine.

In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court first acknowledged that the liberty protected by the Free Exercise Clause of the First Amendment is a "fundamental" right, and thus properly binding on state and local governments through the Due Process Clause of the Fourteenth Amendment. Hence, religious freedom was one of the first provisions of the Bill of Rights to be "incorporated" or "absorbed" as an essential liberty into the Due Process Clause of the Fourteenth.

Free Exercise Clause cases in the 1940's and 1950's witnessed the continuation of a bifurcation, first made in the nineteenth century Mormon Cases,⁷ between religious belief and religious practice. Religious belief was protected absolutely by the First Amendment. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (upholding right of Jehovah's Witness children to not salute the U.S. flag or recite Pledge of Allegiance); *United States v. Ballard*, 322 U.S. 78 (1944) (trial for criminal fraud could not call into question the falsity of religious representations; only sincerity of the accused properly before trier of fact).⁸ But in the nature of things, said the Court, religious practices could not be left unchecked in the

⁷ *Davis v. Beason*, 133 U.S. 333, 342-43 (1890); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

⁸ For later cases to the same effect, see *Torcaso v. Watkins*, 367 U.S. 488 (1961) (no religious oath could be required for holding public office); *Wooley v. Maynard*, 430 U.S. 705 (1977) (upholding Jehovah's Witnesses right to cover up the New Hampshire state motto "Live Free or Die" on car license plate).

face of a strong interest in the protection of society. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding criminal conviction of Jehovah's Witness for violating child labor law); cf. *Cantwell*, 310 U.S. at 304-11 (overturning criminal conviction of Jehovah's Witness for inciting a breach of the peace).

By the end of the 1950's, then, the Free Exercise Clause protected religious belief absolutely. In contrast, the practice of religion was subject to regulation, but only upon a showing that something akin to the "evils most appropriate for such action [as] the crippling effects of child employment" was involved, *Prince*, 321 U.S. at 168, or a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order," *Cantwell*, 310 U.S. at 308.

In 1961 the Supreme Court heard consolidated cases raising several claims concerning the constitutionality of Sunday-closing legislation. *Braunfeld v. Brown*, *supra*, 366 U.S. 599,⁹ presented the issue of whether a Pennsylvania Sunday-closing law interfered with the Free Exercise Clause right of a practicing member of the Orthodox Jewish faith. As a Sabbatarian whose religion prevented the operation of his retail business from sundown Friday until sundown Saturday, Mr. Braunfeld desired to be open for business on Sunday. This option the law denied, to the claimant's substantial economic loss and to the incidental benefit of his non-Sabbatarian competitors.

By a 5 to 4 split, the Supreme Court upheld the state law. In the plurality opinion by Chief Justice Warren, and in the concurring opinion of Justice Frankfurter, joined by Justice Harlan, it was said that the Free Exercise Clause gave no relief because the religious burden was "indirect" or "incidental." *Id.*

⁹ Decided along with *Braunfeld* was *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); and *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961).

at 606 (Warren, C.J.); *id.* at 459, 521-22 (separate opinion by Frankfurter, J.). By "indirect," the Justices did not mean that the burden was insubstantial. Indeed, it was stipulated that if Mr. Braunfeld remained closed on Saturday and was prevented from opening on Sunday, then he would be "unable to continue in his business, thereby losing his capital investment." *Id.* at 521, 601. Rather, by an "indirect" burden the Justices meant that Mr. Braunfeld did not face an unavoidable choice between following the dictates of his faith, thereby breaking the law, or obeying the state law, thereby transgressing against God's commandment. Because Mr. Braunfeld could obey both the commands of law and faith by being closed the entire weekend, albeit with the financial loss of going out of business, he faced no "direct" religious burden.¹⁰ Absent an unavoidable choice between the command of the law and the command of faith, the Court held that Mr. Braunfeld did not state a *prima facie* case under the Free Exercise Clause.

The Court hastened to say that there was no allegation in the case that Pennsylvania had enacted the Sunday-closing law with the discriminatory intent of harming Sabbatarians in general, or observant Jews in particular. *Id.* at 607.¹¹ If Jews had been targeted for disapproval it would have been a different case. See Point I. A. *supra*.

The rule of *Braunfeld*, then, was that when the statute in question is generally applicable and facially religion-neutral, the

¹⁰ Put very simply, a "direct" burden is government action that forbids or compels certain behavior. An "indirect" burden merely makes noncompliance with the law more difficult or expensive.

¹¹ [T]o hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be . . . only indirect.

Braunfeld, 366 U.S. at 607.

Free Exercise Clause is not violated — BUT ONLY so long as the religious burden is “indirect” (*i.e.*, there is a path whereby the dictates of both law and faith can be obeyed) and there is no evidence of discriminatory animus. Although perhaps getting ahead of ourselves, in the present case the burden is “direct” because a Santeria’s choice is unavoidable between obeying the City’s ordinances or proceeding with the ritual of animal sacrifice.

In *Braunfeld*, Justice Brennan dissented on the Free Exercise Clause issue. *Id.* at 610. Two years later, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the rationale of that dissent became the majority rule. In *Sherbert*, a Seventh-day Adventist was discharged by her employer because she would not work on Saturday, a practice proscribed by the tenets of her church. When she applied for unemployment compensation pursuant to the South Carolina Unemployment Compensation Act, benefits were denied. The state Employment Security Commission found that the claimant’s refusal to work on Saturday brought her within the statutory provision disqualifying workers who fail, without good cause, to accept “suitable work when offered . . . by the employment office or the employer.” *Id.* at 401.

Writing for the Court, Justice Brennan reversed the decision below and held that under the Free Exercise Clause unemployment compensation could not be denied. In so holding, *Sherbert* gave rise to two key principles. **First**, that “indirect” as well as “direct” burdens on religious practices were actionable under the Free Exercise Clause. Accordingly, although Ms. Sherbert did not face an unavoidable choice because it was possible for her to keep Saturday as her day of rest and still not violate any law — albeit, she would lose her unemployment benefits — even this “cruel choice” violated free exercise. **Second**, after *Sherbert* it did not matter that the nature of the “indirect” burden is loss of a welfare entitlement payment, as

contrasted with a prohibitive law such as “do not open your retail store on Sunday upon pain of a civil fine.”¹²

Justice Harlan, who had joined Justice Frankfurter’s opinion in *Braunfeld*, dissented in *Sherbert* pointing out the inconsistency in the two cases. *Id.* at 421.

Although resistance to these two significant developments in *Sherbert* surfaced in dissenting opinions of the Supreme Court throughout the 1970’s and 1980’s, the *Sherbert*-approach continued to command a majority. Moreover, *Sherbert* was widely supported by legal commentators. With that in mind, as we entered the 1990’s *Sherbert* was regarded as the fountainhead for the modern, three-step Free Exercise Clause test:

1. The claimant must show that he or she is SINCERE in wanting to conform to the religious practice in question.
2. The claimant must show that the government’s law poses a “cruel choice,” *i.e.*, it places more than a *de minimus* BURDEN, direct or indirect, on the religious practice in question.
3. If points 1 and 2 are satisfied, the claimant has established a *prima facie* case and will prevail, unless

¹² As to this second development, moreover, the Supreme Court in *Sherbert* had to turn back the inevitable argument that requiring payment of an entitlement benefit to a religious dissenter under circumstances where non-Sabbatarians would be denied the welfare benefit, has the effect of establishing a religion. It is one thing to lift a legal prohibition from the religious dissenter, but quite another, argued South Carolina, to require payment of a monetary benefit not available to non-Sabbatarians who are otherwise similarly situated. *Id.* at 409-10. Although dissenting on the Free Exercise Clause issue, Justice Harlan agreed with the majority in *Sherbert* that there would be no Establishment Clause violation if a state chose to statutorily exempt Sabbatarians. *Id.* at 422. It is now clear that legislative exemptions designed to allow freer religious exercise do not violate the Establishment Clause. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Smith*, 494 U.S. at 890.

the government can meet its burden of producing evidence that: (a) the societal interest in applying the law to the claimant is COMPELLING; and, (b) the government cannot achieve the same societal interest by means LESS RESTRICTIVE to the claimant's religious practice.

Concerning any doubt as to the rigor of the burden of production that must be satisfied by the state once the claimant has made out a *prima facie* case, the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), quoting from *Sherbert*, held that the state interests found sufficient to override religious exercise "have invariably posed some substantial threat to public safety, peace or order." *Id.* at 230. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Throughout the 1980's, the compelling interest test was "Black Letter Law." In *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989), the state could not satisfy the compelling interest test. In *United States v. Lee*, 455 U.S. 252 (1982), the Court found a compelling interest. In *Roy*, 476 U.S. at 699-701, and *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990), it was not necessary to find a compelling interest because the claimant failed initially to show religious burden. Indeed, until *Smith*, in only three modern cases has the Supreme Court not applied the compelling interest standard. Two of these cases involved special environments, *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (penitentiary); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (armed forces); and in *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), the claim turned on the government's right to manage its own land.

As stated above, the *Sherbert*-approach was questioned by three Justices in *Roy*, 476 U.S. at 701-12 (plurality opinion of Burger, C.J.), compare *id.* at 724-33 (O'Connor, J., concurring in part and dissenting in part), reaffirmed by a six-judge majority in *Hobbie*, 480 U.S. 136, 141-43 (1987), compare *id.* at 147 (concurring opinion by Powell, J.), reaffirmed in *Frazee*, 489 U.S. 829 (1989), and reaffirmed again in *Swaggart Ministries*, 493 U.S. 378 (1990).

The City of Hialeah is right to identify *Smith* as a significant case that must be taken into account. But the City is WRONG concerning what *Smith* does to modify the doctrinal approach under the Free Exercise Clause. In *Smith*, for the first time, a majority of five justices held that statutory entitlement benefits may be denied if the legislation in question is generally applicable and facially neutral as to religion.¹³ *Smith* was an unemployment compensation benefit case, and thus it must be conceded that it reverses the second key principle of *Sherbert* in this regard.¹⁴ *Smith* also changes the first key principle established in *Sherbert*, namely that the religious burden may be "indirect." Accordingly, the Court in *Smith* has reverted to

¹³ The principled difference between denying a statutory benefit and lifting the burden of a prohibitive law was stated in the separate opinion of Justice Douglas in *Sherbert*:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

374 U.S. at 412.

¹⁴ *Smith's* denial of Free Exercise Clause protection for entitlement benefits can also be justified on the basis that the injury to the claimant is "economic" as opposed to "spiritual." Although the Establishment Clause protects against economic and political harms, it has long been thought that the Free Exercise Clause only protects against injury to religious-based conscience. *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

Braunfeld for its Free Exercise Clause approach. BUT even *Braunfeld* (Warren, C.J.; Black, Clark, Whittaker, Frankfurter & Harlan, J.J.) finds the Free Exercise Clause violated when the religious burden is "direct."

The City of Hialeah argues for a reading of *Smith* that would require of government only that its legislation be "religion blind." Even Justice Harlan, who sided with Warren and Frankfurter in *Braunfeld*, and dissented in *Sherbert*, rejected that contention. *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting) (rejecting such a thesis in a publication by Professor Kurland). See L. Pfeiffer, *Religion-Blind Government*, 15 Stan. L. Rev. 389 (1963) (showing the unworkability of a religion-blind thesis and its wholesale overruling of settled law, both state and federal).

Turning to the issues presently before this Court, the Santerias are faced with: (1) a "direct" burden, one from which there is no path of avoidance; and, (2) incurring the penalty of a prohibitive law, not mere cutoff of social welfare entitlement payments. In *Smith*, compliance was possible because the religious claimants faced only a "cruel choice," (give up their unemployment benefits or give up peyote) not an unavoidable choice between obeying Caesar or God.

In instances where the choice is unavoidable, such as this case, the "direct" burden on religious practice will confront a claimant with a situation calling for an act of civil disobedience. Disobedience for the sake of conscience, in turn, leads to infamous trials that pit the Sovereign in a clash with religious obedience to a believed Higher Power — engendering social division of a far graver kind. Such head-on clashes of the Sacred with the Sovereign are worth the price only when societal interests of the highest order are clearly at risk: for instance, saving the life of a critically injured child by administering a blood transfusion, even when the parents for reasons of faith will

only minister prayer. This Court does not, in the case *sub judice*, have at risk societal interests of that high order.

2. The City's Reading of *Smith* is Contrary to Both Text and History.

The very text of the First Amendment is not facially neutral as to religion.¹⁵ Rather, the text places special value on religion, just as it values free speech and free press.

Exhaustive scholarship into the original meaning of the Free Exercise Clause was released soon after the decision in *Smith*. See M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Professor McConnell demonstrates that statesmen in the founding generation considered exemptions from facially neutral legislation to be free exercise of religion, and they expected this right to be enforced by the courts. At least where the burden is "direct," as it is on the Santerias, history tells us that the Free Exercise Clause is violated.

To read the *Smith* case as permitting generally applicable, facially religion-neutral legislation to apply to "direct" burdens on religious practice, is to attribute to this Court a wholesale overruling of its own precedent. For example, the City's reading of *Smith* would *sub silentio* overrule the following: *Yoder*, 406 U.S. 205 (1972) (state compulsory school-attendance law violates free exercise of Amish); *Barnette*, 319 U.S. 624 (1943) (state regulation requiring salute to U.S. flag and reciting pledge of allegiance by all public school pupils violates freedom of belief of Jehovah's Witnesses); *Cantwell*, 310 U.S. 296 (1940) (statutory and common law offenses of inciting breach of the peace and barring charitable solicitation without permit violates free exercise and free speech of Jehovah's Witness); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute requiring

¹⁵ See *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("It cannot be ignored that the First Amendment itself contains a religious classification.").

attendance at public school, thereby effectively closing parochial schools, violative of substantive due process rights of parents to direct the upbringing of their children, including choice of religious-based primary and secondary education).

On the other hand, should the City argue that *Smith* does not overrule the above-list of established precedent, but simply marginalizes them as "hybrid" cases, then *Amicus* submits that this case is such a "hybrid" situation. *Smith*, 494 U.S. at 882. Point III which follows, argues that the application of the ordinance violates the Church's First Amendment rights under the Establishment Clause.

Of course, there is a serious problem with trying to explain away every relevant precedent as a "hybrid" case. To read *Smith* as merely affording redundant protection to religious speech, religious association, the no-establishment provision, or parental rights, would strip the Free Exercise Clause of any independent force. Such a consequence has a serious textual flaw, for it would leave a major clause in the Bill of Rights without meaning apart from other clauses. Surely this is a clear signal that the City is advancing a mistaken reading as to the scope of the *Smith* case.

II.

THE COMPELLING INTEREST TEST DOES NOT CAUSE A CIVIL MAGISTRATE TO BECOME INVOLVED IN ASSESSING THE "CENTRALITY" OF A RELIGIOUS PRACTICE.

In *Employment Division v. Smith*, 494 U.S. at 886-887., this Court correctly reaffirmed that the First Amendment prohibits a civil magistrate from engaging in a "centrality" test.¹⁶ Performing a "centrality" test requires an assessment of

¹⁶ Lifting language out of *Wisconsin v. Yoder*, the government in *United States v. Lee*, 455 U.S. at 257, argued that a free exercise claimant had to show that the belief giving rise to the desired religious practice was essential to, or

the importance of a given doctrine to the religion in question, or assessing the harm that would befall a religious claimant if he or she had to comply with the legislation in question. *Accord* 494 U.S. at 906-907 (O'Connor, J., concurring) ("our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue").

Amicus is in complete agreement that the First Amendment prohibits a "centrality" test. However, the proper administration of the compelling interest standard of review does not entail a civil court's engagement in the prohibited "centrality" test.

In order to establish a *prima facie* case, two things must be shown: (1) that the claimant is sincere in wanting to conform to the religious practice in question; and, (2) the government's legislation places a "direct" burden on the religious practice. If points (1) and (2) are satisfied, then the claimant will prevail unless the government can meet its burden of producing evidence that: (a) the societal interest in applying the legislation to the claimant is compelling; and, (b) the government cannot achieve the same societal interest by means less restrictive to the claimant's religious practice.

In marshalling the evidence to meet this burden, the government is to offer facts and argument which tend to prove that important objectives (e.g., public health and safety; prevention of fraud) cannot be achieved if case-by-case exemptions are to be granted to religious claimants such as the one before the

"threaten the integrity of," the claimant's church doctrine or belief-system. This "centrality" argument the *Lee* Court rebuffed with this rationale:

It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation."

Id. (quoting *Thomas*).

court. This is indeed a difficult burden, as rightly befits a liberty engraved in the text of the First Amendment.

This evidence and argument does NOT weigh the importance of the particular religious practice in question to a church's overall doctrine, nor does it assess the "spiritual harm" to a claimant should he or she have to obey the law rather than the commands of faith. Accordingly, this is NOT a "balancing" test weighing the interests of the claimant against those of the government, and it is a misnomer to call it such. The only assessment by a civil magistrate is the importance of the law's administration without any exception for the claimant.

Accordingly, in the case at bar the evidence and argument by the City of Hialeah should address, for example, the importance of its ordinances to preventing the spread of disease and/or the desirability of preventing cruelty toward domestic animals. In applying the compelling interest test, there is no need for an examination by a civil magistrate into the importance of ritual sacrifice to the Church of the Lukumi Babalu Aye, Inc., or its followers.

III.

THE CITY'S ORDINANCES HAVE AN INVIDIOUS RELIGIOUS PURPOSE VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

Two of the City's ordinances expressly single-out a religious practice for unfavorable treatment, a third is discriminatory as construed by the state attorney general, and all four ordinances were adopted in an environment openly hostile to Petitioners. See footnote 5 *supra* and accompanying text. As interpreted by this Court, the Establishment Clause prohibits a legislative purpose¹⁷ that has as its object invidious discrimina-

¹⁷ A "purpose" inquiry is the first prong of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

tion against a religious denomination or a particular religious practice.¹⁸

The matter of religion is twice addressed in the First Amendment, initially in the Establishment Clause and then in the Free Exercise Clause. Cardinal rules of construction, as well as common sense, dictate that the text of the two clauses be construed and applied so as not to contradict one another. Indeed, the two provisions are often mutually reinforcing, each Religion Clause pointing in its own way toward the ultimate goal of religious liberty.

Should a government enact a law compelling all citizens (upon pain of misdemeanor for noncompliance) to attend weekly a Roman Catholic Mass, the law would be violative of *both* Religion Clauses: the Establishment Clause because the legislation tends to "establish" the Roman Church, and the Free Exercise Clause because coerced attendance would violate the conscience of many.

As a second illustration—one closer to this case—consider a law whereby persons holding membership in the Episcopalian Church are required to pay an additional tax of \$1000 per dependent when filing their annual income tax return. The law is coercive as to the religious practice of church affiliation, thus contrary to the Free Exercise Clause. The tax also violates the Establishment Clause because it has the purpose of discriminating against a particular denomination.

This "overlap" in the prohibitions of the Establishment and Free Exercise Clauses is not indicative of "confusion" or "conflict" or "tension" between the Religion Clauses, but is a proper

¹⁸ See M. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 144 (1992) ("[A]bandoning the purpose prong would be an overreaction. . . Purpose is a necessary backstop to facial neutrality. Facially neutral categories drawn by a law may be pretextual. . .")

recognition that in certain instances BOTH provisions are violated.¹⁹

The "overlap" has been noted in this Court quite often, implicitly as well as explicitly. For example, several of this Court's cases state that legislation which intentionally targets a religious practice or a religious denomination is unconstitutional. In *Employment Division v. Smith*, 494 U.S. at 877, the Court said: "The government may not compel affirmation of religious belief . . . punish the expression of religious doctrines it believes to be false . . . impose special disabilities on the basis of religious views or religious status . . . or lend its power to one or the other side in controversies over religious authority or dogma . . ." In support of this statement the Court cited cases that relied in whole or in part on the Establishment Clause. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (religious oath for assuming public office), relied upon discussions of church-state separation and Establishment Clause cases, as well as individual free exercise. In *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion) (law preventing "ministers" from holding public office), the Tennessee law was said to be violative of both Religion Clauses. *Id.* at 636-642 (Brennan, J., concurring). *Larson v. Valente*, 456 U.S. 228 (1982) (charitable solicitation regulation), held that discrimination among religions or denominations violates the Establishment Clause.²⁰ As to the string of

¹⁹ This is not unlike the situation in *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court suggested that a state university regulation violated both the Free Speech and Free Exercise Clauses. "[T]he state interest here . . . is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Id.* at 276.

²⁰ See also *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (discriminatory denial of permit to Jehovah's Witnesses to hold services in public park is preferring some religious groups over others); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (discriminatory denial of permit to Jehovah's Witness to use city park for public gathering denied "equal protection of the laws, in the exercise of those freedoms of speech and religion"); cf. *Jimmy*

citations in *Smith* to intrachurch dispute cases, an examination of that line of authority reveals that the Court is careful to ground those holdings in both Religion Clauses, i.e., a generalized notion of "First Amendment religious liberty."

The Court in *Smith*, 494 U.S. at 878, went on to poise a tax hypothetical similar to the example above of the \$1000 church membership tax. *Smith* said that if "the object of the tax" was "prohibiting the exercise of religion," then the "First Amendment [has] been offended."²¹ By the word "object" presumably the Court meant the objective purpose of the lawmaker.²²

Because of the difficulty in determining the true motives of a group of lawmakers - as distinguished from their objective purpose - for enacting a statute or promulgating a particular policy, the Court has avoided making motive-analysis part of

Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 385-392 (1990) (explaining prior cases as requiring that no flat license tax may operate as a prior restraint on religion, nor may religious activity be singled out for burdensome tax treatment).

²¹ This Court's entire passage reads as follows:

It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Smith, 494 U.S. at 878.

²² Justice Scalia usefully distinguished "objective purpose" from "motive" in *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

the legal doctrine in most areas of constitutional law.²³ With the Establishment Clause, while not abandoning motive-analysis altogether, the Court has adopted a deferential inquiry into whether the "purpose" was secular or religious. When no unconstitutional purpose appears either on the face of the challenged statute, or in its official legislative history, this Court has been inclined to announce the first element of the *Lemon* test satisfied and move quickly on to the "effect" and "entanglement" prongs.²⁴ This Court has, in most cases, found a permissible or impermissible purpose in a statute's language simply by exercising common sense.²⁵

Justice O'Connor's discussion in *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985), explains the methodology for courts to follow in deferring to a legislative act that is arguably unconstitutional in purpose. Justice O'Connor stated:

Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible ad-

²³ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purpose are a hazardous matter."); cf. *Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large voting system maintained for racially discriminatory purpose).

²⁴ See *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983), where, concerning the deferential application of the "purpose" prong in *Lemon*, the Court said: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

²⁵ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 224 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

ministrative agency suggests it has the primary purpose of endorsing prayer.

Two of the ordinances expressly target a religious practice, a third ordinance as interpreted by the Attorney General is discriminatory as well, and all four ordinances were passed in a religiously hostile environment. See footnote 5 *supra* and accompanying text.

Using the three criteria suggested from *Wallace v. Jaffree* for ascertaining the lawmaker's purpose: the text of the ordinances, the definitive interpretation by the Attorney General opinion, and the religiously hostile environment, unmistakably point to a purpose which was invidious or discriminatory toward the Church of the Lukumi Babalu Aye, Inc., and its religious practice of animal sacrifice.²⁶

It cannot be gainsaid that the Petitioners' religious liberty is protected by more than the Free Exercise Clause. The Establishment Clause also prohibits the City of Hialeah from enforcing these ordinances which have as their *object* inhibiting the practice of animal sacrifice as conducted by the Church of the Lukumi Babalu Aye, Inc.

CONCLUSION

Amicus requests that this Court reverse the judgment below on the basis that the ordinances had an invidious discriminatory purpose violative of both the Free Exercise and Establishment Clauses.

²⁶ The second and third prongs of the Supreme Court's three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), acknowledges that the Establishment Clause may play a role in preventing government from harming a religious group. "[A] statute's principle or primary effect must be one that neither advances *nor* inhibits religion" and "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-613. Likewise, the alternative "endorsement test" when first suggested by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), prohibited not only government "endorsement" but also official "disapproval" of religious practices or groups.

In the alternative, *Amicus* requests that this Court specifically set aside the conclusion of law that the City had compelling reasons for its ordinances. Then the case should be remanded with directions to hold a new trial (or reopen the judgment and receive further evidence). At the new trial, the District Court should be directed to: (a) properly apply the "compelling interest, least restrictive means" standard, thereby (b) placing the burden of producing evidence on the City for showing that actual harm has occurred or will occur to society should its ordinances be unenforceable against Petitioners.

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OCTOBER TERM, 1991

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and ERNESTO PICHARDO,
Petitioners,

v.

CITY OF HIALEAH,
Respondent.

On Writ of Certiorari to the
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BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AS *AMICUS CURIAE*
IN SUPPORT OF NEITHER PARTY

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<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	<i>passim</i>
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<i>In re United States Catholic Conference</i> , 885 F.2d 1020 (2d Cir. 1989), <i>cert. denied</i> , 495 U.S. 918 (1990)	18
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	19
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<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	9
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<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat.) 304 (1816)	10
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<i>Montgomery v. County of Clinton</i> , 743 F. Supp. 1253 (W.D. Mich. 1990), <i>aff'd mem.</i> , 940 F.2d 661 (6th Cir. 1991)	14
<i>NLRB v. Hanna Boys Center</i> , 940 F.2d 1295 (9th Cir. 1991)	15
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<i>Presbyterian Church (U.S.A.) v. United States</i> , 752 F. Supp. 1505 (D. Ariz. 1990)	18
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<i>Rayburn v. General Conference of Seventh-Day Adventists</i> , 772 F.2d 1164 (4th Cir. 1985), <i>cert. denied</i> , 478 U.S. 1020 (1986)	18

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<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	12
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<i>The Religious Freedom Restoration Act: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary</i> , 102d Cong., 2d Sess. (May 13, 1992) (Statement of Nadine Strossen, President, American Civil Liberties Union)	15
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BOOKS & STUDIES:

D. Ackerman, <i>The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis</i> , Congressional Research Service, American Law Division (Library of Congress, April 17, 1992)	3
G. Gallup & J. Castelli, <i>The People's Religion: American Faith in the 90's</i> (1989)	7
M. Glendon, <i>Rights Talk</i> (1991)	12
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Carmella, <i>House of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review</i> , 36 Vill. L. Rev. 401 (1991)	13
Chopko, <i>Has U.S. Society Become Anti-Religious?</i> 21 Origins 306 (Oct. 1991)	7
Chopko, <i>Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations</i> , 39 DePaul L. Rev. 1143 (1990)	8
Duerkson, <i>Regulating Religious Properties in The 1990's</i> , 14 Zoning & Planning Law Report 169 (1991)	12
Glendon, <i>Law, Communities and the Religious Freedom Provisions of the Constitution</i> , 60 Geo. Wash. L. Rev. 672 (1992)	11, 15
Glendon & Yanes, <i>Structural Free Exercise</i> , 90 Mich. L. Rev. 477 (1991)	5, 16

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Laycock, <i>The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed</i> , 8 J. Law and Religion 99 (1990)	9
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McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 Harv. L. Rev. 1409 (1990)	3, 6, 9, 16, 17
McConnell, <i>The Religion Clauses of the First Amendment: Where is the Supreme Court Hearing?</i> , 32 Cath. Law. 187 (1989)	12, 16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-948

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

v. *Petitioners,*

CITY OF HIALEAH,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AS *AMICUS CURIAE*
IN SUPPORT OF NEITHER PARTY**

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in diverse areas of the nation's life, such as the expression of ideas, fair employment and antidiscrimination policies, family life, and the rights of religious communities. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the

Church are the protection of the rights of religious organizations and their adherents, and the developing jurisprudence surrounding the Free Exercise Clause of the first amendment.

This case gives the Supreme Court its first opportunity to refine its interpretation of the Free Exercise Clause after *Employment Division v. Smith*, 494 U.S. 872 (1990). The present case involves a city ordinance which the district court below found directly proscribed petitioners' religious practices. Petitioners urge a higher level of scrutiny upon the city's efforts to discriminate against them; the city urges minimal scrutiny on the grounds that the ordinance on its face applies neutrally across the board. More basic perhaps than whether either side is ultimately right about the level of scrutiny, or who has the burden of proof, is the shape and direction of Free Exercise jurisprudence after *Employment Division v. Smith*. It is to that issue—and that issue alone—that the Conference speaks. Accordingly, the Conference takes *no position* whether the petitioners or the city should prevail in this dispute.

Through counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Faced with what a majority believed was a request for a special exception to a generally applicable criminal drug statute, *Employment Division v. Smith* found that the Free Exercise Clause did not justify such an exception. Only the legislature could decide whether to depart from the state's criminal law. In so ruling, however, a bare majority expressed concern with litigation over increasingly diverse claims expressed in religious language. 494 U.S. at 888-89. The Court attempted to fashion a single test of deference to the legislature that could be utilized to resolve many of the complex free exercise claims that arise in the context of our modern pluralistic society.

Smith has made it much more difficult for religious adherents to prevail in litigation when their sincere religious practices are, in fact, substantially burdened by government action. Indeed, surveys of cases decided after *Smith* indicate that its application has resulted in a more thoroughgoing rejection of religious claims than had existed in the previous twenty years.¹

The Court alternately has raised the hope that religious organizations might be able to turn to legislators and executives for more favorable or sensitive treatment, a treatment which they had heretofore expected to find in the courts. Legislative and executive treatment favorable to religion has proved elusive, for political and other reasons. After *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the prospect of affirmative legislative relief being sustained under the Establishment Clause has dimmed. After *Smith*, the prospect of affirmative judicial relief under the Free Exercise Clause has also dimmed. Rather than serving as an article of personal protection through which individuals and their religious organizations, especially minorities, might have some hope of redress from the judiciary, the Free Exercise Clause seems to have been abandoned to the political process, a result which the majority candidly observed would leave minorities at a "relative disadvantage." Compare *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), with *Smith*, 494 U.S. at 890. Religion is not the only thing abandoned by *Smith*. History and tradition, the key considerations applied by this Court in Religion Clause cases, have likewise been lost along the way. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). If it had been the guide for judicial review, relegation

¹ Much of this litigation is summarized in a recent report of the Congressional Research Service, D. Ackerman, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis*, CRS American Law Division (Library of Congress, April 17, 1992).

of religious practices to the political branches alone would not have been this Court's solution.

This Court should not permit its Free Exercise jurisprudence to continue to develop along the lines suggested in *Smith*. To do so disserves the purposes of the Bill of Rights and the constitutional protection it affords individuals, their organizations, and communities of faith. To do so would ultimately prove more frustrating to the Court and to religious communities, whose basic practices are now more susceptible to restriction. It is not too soon to begin the process of confining *Smith* to its facts and begin a new commitment to the protection of religion. As a start, the Court should consider some objective guidelines to define religious practices protected under the Free Exercise Clause and add substance to the level of scrutiny appropriately placed on government whenever such a practice is burdened.

This case gives the Court an opportunity to provide additional clarification in light of the judicial experience after *Smith*, and in anticipation of additional challenges being filed. This *amicus* takes no position on the merits of the underlying dispute.

ARGUMENT

To reassure its citizens of its intentions, the Framers of our Constitution denied the new Congress the power to "prohibit[] the free exercise" of religion. U.S. Const., amend. I. In a new country already experiencing political, social, cultural, and religious pluralism,² any other course would have been futile at best and divisive at worst.³ The prospect that any citizen might resist the

² I A. Stokes, *Church and State in the United States*, 228-30 (1952).

³ For this reason, James Madison initially opposed an amendment on religion as simply unnecessary. III *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 330 (J. Elliot 2d ed. 1836).

power of government and the prerogatives of shifting political majorities proved a significant attraction to those fleeing from a religious conflict borne of bigotry. Immigrants brought their own faiths, beliefs, and practices. Each new culture added to the diversity and, touching the old arrivals, strained the civic harmony. Although occasionally ignored in *practice* to the detriment of individuals and faith communities, the *promise* of freedom of religious practice, except when those practices actually threatened the public health, safety, or order, endured. At a fundamental level, there was consensus that religious freedom was basic to the life of this country, so much so that the protections of the Religion Clauses were extended to all citizens to resist even the action of state governments. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause).⁴

The presence of the religious liberty protection in the Bill of Rights is important. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). It confirms that these values were elemental to the Framers and adds an essential, personal dimension. The Bill of Rights preserves the rights of the few and the powerless from the political will of the many and powerful. *West Virginia v. Barnette*, 319 U.S. at

⁴ Commentators attribute some of the lack of doctrinal clarity to the separate incorporation of both halves of the Religion provisions. Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 481-86 (1991) (pointing to Establishment Clause interpretations that penalize Free Exercise). Whether there is one, two, or more Religion Clause(s) is not the point of this discussion. This discussion is about constitutional values and judicial consistency, and their applications to religious practices in litigation. *Smith* is a symptom, not the problem. Indeed, one of the disturbing developments characterized by *Smith* is the Court's continued willingness to construe the Clauses as if they were intended to achieve different ends and different objectives. A review of Glendon and Yanes, for example, would helpfully illuminate the roots of the problem and begin a process of reconstruction of Religion Clause(s) jurisprudence. *Id.* at 478.

638-39.⁵ When enforced by this Court, the Free Exercise Clause ensured that religion was free to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Barely ten years ago, an overwhelming majority of this Court stated "the Free Exercise Clause . . . , by its terms, gives *special* protection to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981) (emphasis added). The Court was involved in the shape and direction of a jurisprudence providing religious claims significant procedural protection.

The Court seemingly abandoned its important role in protecting religious practices in *Smith*. A bare majority there held that, unless a legislature or executive was politically insensitive enough to single out religion for adverse treatment,⁶ judges would not be required to scrutinize governmental action that impaired a religious practice to determine whether the government had demonstrated a narrowly drawn means to achieve a compelling interest. 494 U.S. at 882-85. Instead, the religious claimant would now bear the burden of proving that the government's action was irrational.⁷ As this Court has

⁵ McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1416-17 (1990).

⁶ In *Smith* the majority alluded to a number of possible exceptions for litigation of claims involving the autonomy and governance of religious communities; claims where a statute already provided for individualized exemptions; and claims implicating several rights. *Employment Division v. Smith*, 494 U.S. at 881-82. The scope of these exceptions is not clear.

⁷ Demanding that the proponent of religion (not the opponent) bear the burden of proof is a recent result in this Court and can produce unfair and impractical results. Under the Establishment Clause in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court disregarded a factual record in which not a single "establishment" was established over two decades. The result has been that tens of thousands of educationally disadvantaged children have been deprived of much needed remedial services, or have received inferior

recognized, the outcome of litigation, and the vindication (or lack thereof) of legal rights, depends very often on the process by which cases are adjudicated. *Speiser v. Randall*, 357 U.S. 513, 520 (1958). This new approach has set the judiciary on a course contrary to history, jurisprudence, and the Court's own important role in protecting religious liberty. It has resulted in an uncertain recourse to the legislature at a time when this Court seemingly has foreclosed the licitness of particular legislative relief. The shift has resulted in an easier path for courts, legislators, and executives to reject or ignore sincere religious claims. Under *Smith*, religion, long thought the "First Freedom," is treated "like everything else." *Smith* is bad law and bad policy. It should be reconsidered and abandoned.

I. THE COURT MUST REVISIT ITS FREE EXERCISE JURISPRUDENCE BECAUSE OF *EMPLOYMENT DIVISION v. SMITH*.

The prominent role of religion in the life of the American people is evident. The vast majority believe in God and attend religious services.⁸ More than any other factor in their lives, religion shapes their purpose, direction, and activities. Many schedule their daily and weekly activities around the timing of worship. People mark important events in their lives—births, deaths, marriages, and the attainment of adulthood—by religious observances. The calendar year is even dictated, for a religious adherent, by activity associated with the practice of faith. Religious demands become matters of obligation, not whims of

services at greater public expense. The proponents of the remedial education programs in religious schools failed because they could not prove there would never be a violation, except through pervasive surveillance (i.e., excessive entanglement). See Chopko, *Has U.S. Society Become Anti-Religious?* 21 *Origins* 306, 307 (Oct. 1991).

⁸ G. Gallup & J. Castelli, *The People's Religion: American Faith in the 90's*, at 4 (1989).

caprice or choices of convenience. Values and practices, when internalized, become articles of faith, acted out daily. More than just a strong moral code, articles of faith point adherents toward lasting, and even everlasting, realities.

Precisely because these matters of religious faith are matters of obligation, the Framers, themselves people of great faith and devotion, placed a high premium on their protection. As a matter of constitutional principle, religion would be entitled to benevolent treatment at the hands of government. Our amended Constitution provides that each individual has the right to practice his or her religion as long as it does not actually and significantly threaten the public health, safety, or order. The engines of government, perhaps prodded by the judiciary, have endeavored to provide such benevolent treatment. They did so, as matters of sound public policy, following the dictates of constitutional law. The difficulty with *Smith*, at bottom, is that it undermines this long history and tradition, abandons the historic role of the Court, and jeopardizes what, for many people, are matters of deep religious conviction.

A. *Smith* Departs From History And Tradition.

This Court consistently relies on history for guidance in interpreting constitutional text, especially the Religion Clauses. *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983). Even though the Court has looked to history and tradition in construing the Establishment Clause,⁹ the majority opinion in *Smith* seemed to ignore history and tradition altogether in construing the Free Exercise Clause. That error should be corrected.

⁹ The better view of the historical treatment of the Establishment Clause is found in the dissenting opinion of Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 91 *et seq.* (1985). See also Chopko, *Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations*, 39 DePaul L. Rev. 1143, 1162-69 (1990) (summarizing and citing authorities).

A thorough treatment of the history and tradition embodied in the Free Exercise Clause is found in an article by Professor Michael McConnell, published by the *Harvard Law Review* contemporaneously with the decision in *Smith*.¹⁰ The article recites in great detail the anecdotal, documentary, legislative, and judicial history of the understanding of protection of individual religious practice, prior to, during, and immediately following adoption of the Free Exercise Clause. Professor McConnell's scholarship indicates considerations that should illuminate Free Exercise jurisprudence, and any reconsideration of *Smith*. That anecdotal, documentary, legislative, and judicial history points to one overarching theme. In a clash between the dictates of conscience and the dictates of government, the individual *religious* conscience is to be given the benefit of every doubt. Absent grave reason, the government is not empowered to force an individual to forego religious convictions. Our history and tradition surrounding adoption of the Free Exercise Clause shows that when legislatures burden religion, the judiciary is empowered to provide relief. Until *Smith*, the Court did not abandon claimants to the vagaries of partisan politics. The majority's willingness to disregard history not only led to the flawed decision in *Smith*, but also undermines the legitimacy of its promise, stated elsewhere in the case law, that it would rely on history and tradition in construing the Religion Clauses. *Lynch v. Donnelly*, 465 U.S. at 673-78.

B. *Smith* Turns To Political Processes For Protection of Personal Liberty.

Smith undermines the Court's historic role to construe the language of the Constitution, to say what the law is and shape its direction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court has bound itself

¹⁰ See McConnell, *supra* note 5. See Laycock, *The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed*, 8 J. Law and Religion 99 (1990).

to construing the Constitution reasonably, giving terms their "natural and obvious" meaning and "not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874). The import of *Smith* is that the Court will no longer say what burdens on what religious exercises are appropriate. It throws the matter to the judgment of legislatures for substance and direction, seriously jeopardizing protection of politically powerless minorities from majoritarian excess. As this Court said in *West Virginia v. Barnette*, a Bill of Rights vests individuals with enumerated rights beyond the power of the state unreasonably to regulate or restrict. 319 U.S. at 639. In our tradition, to date, the judiciary, not the legislature, interprets these rights according to the values sought to be protected by those who framed the provisions. Under *Smith*, except in very limited circumstances, the role of the judiciary is otherwise when the matter is the enumerated right to the free exercise of religion.

In many instances, the legislature or the executive may be a preferred (if not the only) mode for weighing and balancing competing claims of rights, especially where there is no agreement on the nature of the claimed right or on the degree to which it may legitimately be rooted in the Constitution. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989) (plurality) (commenting on role of the legislature). However, to depend primarily on legislatures and executives to protect the preferred position of an enumerated right like religion, when the majority opinion in *Smith* (and other cases) signal that religion need not be taken seriously, puts religious freedom at severe risk. For the most part, it is politically or administratively inconvenient for legislatures to enact particular exemptions, without compelling justification or

strong political motives. It subjects religion and religious practices to interference whenever the legislature believes it reasonable to do so (as long as it has some articulable basis), or worse, affirmatively abandons such regulation to shifting demographics. In tolerant regions, religion will be better off, one hopes. This path is particularly imprudent and improvident for the future of religious freedom. It is largely one of the Court's own creation, and within the Court's power to remedy.¹¹

Moreover, the Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), suggests the prospect of affirmative neglect. There are limits to the very legislative process that the majority in *Smith* outlines as the "preferred" alternative to litigation. *Bullock* indicates that when religion is given the precise special treatment that the majority in *Smith* invites, the legislature nonetheless risks invalidity under the Establishment Clause. The Court has therefore created a dilemma. It has thrown the resolution of religious claims into the hands of political executives and political majorities but, at the same time, indicates that singular protection of religion, even religions that can command a popular majority, risks invalidity. Faced with this dilemma, the likely result will be inaction. To be an effective force in construing what the law is, the Court must be willing, as part of its historic jurisprudential duty under our system of government, to protect the rights of minorities and to say that these rights, absent grave reason, must be protected against the prerogatives of the majority.

C. The Court Undervalues Religion As A Special Constitutional Matter.

Bullock and *Smith* contribute to the attitude that religion simply does not matter more than any other asserted interest. The inclination of Americans early in this

¹¹ Glendon, *Law, Communities, and the Religious Freedom Provisions of the Constitution*, 60 Geo. Wash. L. Rev. 672 (1992).

nation's history to use legal language in public discourse has today blossomed into the notion that what is legal is therefore moral.¹² The special place of religion therefore risks being undercut if our legal institutions fail to accord it the protection that the Framers intended. The Court deepens and lends a false legitimacy to a dangerous trend within our society to treat religion "like everything else" when, in cases like *Bullock* and *Smith*, it fails to accord religion the constitutional protection our Constitution demands.¹³

For example, until recently, it was fairly standard legal practice in real property law that churches were always permitted uses, which added to the value of a community and a neighborhood.¹⁴ In an increasingly mobile and land-conscious society vying for space, it has become difficult to receive permissions from local planning commissions to build new churches to serve a population that moves, grows, and shifts. Even when land is available and religious groups are already part of the community, religious groups can sometimes face hostile treatment disguised as neutral land use control or building regulation. For example, historic preservation is an

¹² M. Glendon, *Rights Talk* 1-4, 17, 56-61, 78-81, 87, 104, 154-55 (1991). A preeminent example of this attitude is found in the shift in public opinion following *Roe v. Wade*, 410 U.S. 113 (1973). Before *Roe*, political compromise on abortion resulted in governmental regulation far different from the regime of abortion on demand that has resulted from that decision. Once *Roe* enshrined abortion as a "right," public attitudes shifted. For some, that decision ended all further moral inquiry because they equate what is legal with what is moral. It has taken the religious and other leaders of this country nearly twenty years to explain, from a human and moral standpoint, what abortion really is.

¹³ See McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 Cath. Law. 187, 188-89 (1989).

¹⁴ Duerksen, *Regulating Religious Properties in the 1990's*, 14 Zoning & Planning Law Report 169 (1991).

important value, but can conflict with the rights of autonomous religious organizations to create their structures to express worship through architecture¹⁵ or in particular services needed by the faith community. This is not to say that local legislatures and commissions should not attempt to resolve these claims in the first instance. However, after *Smith*, those decisions are effectively final—no compelling reason for any burden on religion will be demanded of government by an independent adjudicator.¹⁶ Religion becomes, "like everything else," just another factor for evaluation. The losers simply go home, not to court.

Plainly, prior to *Smith*, application of a compelling interest analysis did not vigorously protect religious practices. Except in the area of unemployment compensation, many courts had been willing to defer to any articulated compelling interest without regard to its narrowness or the relationship between the interest asserted and the practice regulated. See *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 622-25 (9th Cir. 1988) (Noonan, J., dissenting). On some occasions, this Court has not even explicitly applied the test. In cases involving public institutions such as prisons or the military,¹⁷ or govern-

¹⁵ Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401, 460-75 (1991).

¹⁶ *St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S.Ct. 1103 (1991). In those jurisdictions which have not abandoned the idea that those who attack religious enterprises bear the burden of justifying the narrow nature of their assault and the compelling justification therefor, courts have reached different results. *Society of Jesus v. Boston Landmarks Commission*, 409 Mass. 38, 564 N.E.2d 571 (1990).

¹⁷ *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986). Those kinds of cases are exceptions anyway because of the public institutional character of the dependents. J. Jacobs, *Individual Rights and Institutional Authority* (1979).

ment proprietary interests,¹⁸ the Court simply balanced interests. In other cases, the Court has been much more willing to defer to various assertions of administrative convenience, such as the interest in the uniform application of the tax laws, a code already riddled with numerous exceptions and special rules. Some commentators had come to refer to the Court's pre-*Smith* compelling interest jurisprudence as a "Potemkin Village."¹⁹ *Smith* showed that it was a simple step to abandon it altogether.

It is time to set the record straight. Religion is a preferred constitutional value, entitled to benevolent treatment by government, including this Court. Certainly, in light of *Smith*, religion deserves better treatment than it is now receiving at the hands of courts and legislatures throughout the United States. Because religion matters, those who would curtail religious activity should bear the burden of showing why it must be regulated. The government should be required to demonstrate a narrowly drawn and significant compelling interest to justify inroads on religion.²⁰ There is much confusion about what *Smith*

¹⁸ *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

¹⁹ McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chicago L. Rev. 1120, 1121-22 (1990). One need only to examine *Lyng v. Northwest Indian Cemetery Protective Association*, *supra*, to see the extent to which the Court has gone: "Even if we assume that . . . [the highway] will 'virtually destroy the . . . Indians' ability to practice their religion' . . . the Constitution simply does not provide a principle that could justify upholding [the Indians'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." 485 U.S. at 451-52.

²⁰ See Arg. II, B, *infra*. Citing *Smith*, many lower courts have declined to apply the compelling interest analysis in situations where religious beliefs or practices have been burdened. See, e.g., *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd mem.*, 940 F.2d 661 (6th Cir. 1991) (statute requiring an autopsy upheld despite claims that the autopsy violated religious beliefs); *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (third

means,²¹ whether it is limited to criminal cases or applies across the board,²² displaces all compelling interest analysis for all time,²³ is simply an aberration,²⁴ or portends a greater change in protection of individual liberties.²⁵ Given the paucity of chances through which this Court may address free exercise jurisprudence, this case is perhaps the only vehicle available in the foreseeable future through which this Court may begin needed clarification and reform.

II. THIS COURT MUST GIVE CONTENT AND DIRECTION TO FREE EXERCISE JURISPRUDENCE.

The *Smith* majority seems to have been overly concerned with the multiplication, personalization, and seeming trivialization of claims framed in religious liberty language. *Smith*, 494 U.S. at 888. The Court narrowly focused on

party tax levies upheld against religious organization that, at request of two employees, had refused to withhold a portion of their income taxes). In the latter case, the court stated a different result was possible under the pre-*Smith* test. 753 F. Supp. at 1305-06.

²¹ See, e.g., *Salaam v. Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990), where the court commented that "*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."

²² Compare *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 195 (3rd Cir. 1990) (rejecting argument that *Smith* is confined to criminal statutes) with *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305 (9th Cir. 1991) (suggesting that *Smith* is confined to criminal statutes).

²³ Some have suggested that in *Smith* "the Court wrote the First Amendment's guarantee of the free exercise of religion out of the Constitution." *The Religious Freedom Restoration Act: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (May 13, 1992) (statement of Nadine Strossen, President, American Civil Liberties Union).

²⁴ Glendon, *supra* note 11.

²⁵ *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2467 (1991) (Scalia, J., concurring).

the elements of individual claims demanding time and attention in the judicial system. To a certain extent the problem with which the majority struggled in *Smith* has at least two facets. One aspect of the problem is inherent in the nature of protection intended for religious claims; the other is part of this Court's case law. The first amendment gives a preference to claimants seeking judicial review of governmental action burdensome to religious practices. As will be explained further below, when these practices do not actually threaten the public health, safety, or order, or another person's life or property in a significant way, that claim, on its face, is entitled to redress. That person is entitled to redress because those who framed the Religion Clauses, in that complex mix of political, cultural, social, and legal concerns that found expression in the first amendment, intended it so. McConnell, *supra* note 5, 103 Harv. L. Rev. at 1510-13, 1516.

The other aspect of the problem, frankly, is one of the Court's own making. The Court has been unwilling to give a substantive interpretation to the Free Exercise Clause, content to allow claims to be raised and litigated in increasingly particular, personal, and sometimes contradictory ways. McConnell, *supra* note 13, 32 Cath. Law. at 195-98. This Court has given insufficient attention to the relationship between the Free Exercise and the Establishment Clauses. Beyond general comments about "play in the joints"²⁶ or complimentary "buttress[es],"²⁷ the Court has not indicated precisely the values that underpin both Clauses or even, apart from a few passing references, to attempt a homogenous construction of both aspects of the same section of the first amendment.²⁸ Moreover, the Court has not recently elaborated to any great extent on the meaning and import of a "compelling interest" analysis. Rather than defer to legislators and

²⁶ *Walz v. Tax Commission of New York*, 397 U.S. 664, 669 (1970).

²⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

²⁸ See Glendon & Yanes, *supra* note 4; McConnell, *supra* note 13.

executives, the Court should attempt to interpret what these protections mean. In the interest of aiding that kind of analysis, this *amicus* offers the following observations.

A. The Protection Of Religious Liberty.

The inability or unwillingness of the Court to interpret substantively the Free Exercise Clause contributes to the sense that it is an exhortation, not a conferral of rights. It encourages reduction of complex and difficult legal language to vague generalities about personal liberty. Like the Religion Clauses themselves, phrases and platitudes about them are pregnant with meaning, freighted with the concerns of people speaking in general terms to a potentially divisive, difficult, subtle and complex situation. They yield nothing to guide a useful interpretation of a constitutional provision. It is much more difficult to give an operational definition that, objectively, would be able to guide executives, legislators, and judges in construing the scope and direction of the Clauses. But that is what must be done.

With specific reference to the concern of the majority in *Smith* (494 U.S. at 888), one way to give content and direction to guide the adjudication of individualized claims would be to construe the Clauses according to their text, illuminated by history and tradition. Scholarship indicates that the Framers intended the vindication of personal religious rights against the government's power to regulate (except as described below). The Framers, in protecting personal religious liberty, sought to avoid, if possible, the choice between a temporal benefit (or proscription) and a matter of religious prohibition or obligation.²⁹ Not every individual value choice fits a standard involving matters of religious conviction in conflict with the power of the state in the way the Framers envisioned

²⁹ See McConnell, *supra* note 5, at 1511-17.

in the Religion Clauses. The precise conundrum occurs in some circumstances more than others.

At a minimum, the freedom to preach, practice, and proselytize when restricted by the state creates a conflict between obligations. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Interference with the freedom to organize and operate a religious community institutionally separate from other secular or religious organizations in that society is another like situation. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). Any impairment of the liturgical, worship, and ritual life of that religious community results in a conflict with constitutional rights. *Presbyterian Church (U.S.A.) v. United States*, 752 F. Supp. 1505 (D. Ariz. 1990). Religion enjoys the freedom to select who ministers to that community in accord with its doctrine free of interference by the state. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Attempts to dictate these choices by secular standards create the kind of conflict foreseen by those who framed the Religion Clauses. Consistent with the values underlying the Religion Clauses, the Court should offer strong protection, at a minimum, for these practices borne of deep religious belief.³⁰

³⁰ By definition, this formulation does not necessarily involve those matters which do not go to the freedom to believe or practice in peace—matters which are virtually indistinguishable from the kinds of concerns that any other person could raise. One obvious example would be taxpayer injury. A religious adherent may have a strong sense of indignation about the payment of taxes on account of some religious belief or value but the injury stated does not in any way affect the ability of that individual to practice his or her religion. See *Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971); cf. *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990). In the absence of clear direction from this Court, those claims may persist.

B. The Circumstances Under Which Religious Liberty Claims May Be Impaired By The State.

A simple recitation by the government that it has an interest that *it asserts* is compelling is not enough. This Court should return to a starker, more demanding formulation when the above kinds of religious claims are involved. As this Court said in *Cantwell*, that kind of interest should be “narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state. . . .” *Cantwell v. Connecticut*, 310 U.S. at 311. As restated subsequently in *West Virginia v. Barnette*, the preferred place for religious exercise is “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.” 319 U.S. at 639. See also *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Cases approving the imposition of state controls over religious practices illustrate the kinds of grave and immediate threats to important state interests which the Court has recognized. The government has inherent power to protect life or property. Obvious conflicts in which religious practices might yield are threats to the public health and safety, such as might occur in excusing vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), or avoiding enforcement of child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944). Where a religious practice might also directly affect the life or the property of another person, the state may have adequate reason to regulate religious practices. *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949).³¹ Where the interest articulated by the state is important, but does not seek to avert a clear and immediate danger to public health and safety, life or property, that interest would seem to yield under appropriate circumstances. A primary exam-

³¹ Abortion too presents a clear and immediate danger to human life and therefore warrants the strongest kind of governmental protection, even when abortion is allegedly sought on the basis of religious belief.

ple is *Wisconsin v. Yoder*, 406 U.S. at 217-18, 229-30, in which the substantial interest in education yields to the religious interest of parents in the formation of their children. There the state could not sustain its burden to prove there was any threat "to the physical or mental health of the child or to the public safety, peace, order, or welfare. . . ." *Id.*

Without this kind of reformulation of both the content of religious liberty or the meaning of a compelling interest analysis, the Court allows an unfortunate and frustrating trend to continue. Under *Smith*, a practice grounded in deeply experienced religious conviction is indistinguishable from a matter of personal caprice. This is neither good law nor good policy. It invites reconfirmation of *Smith*, sweeping too broadly to be legitimate constitutional process. Because this Court has contributed to the persistence of this problem, and because *Smith* is not a sufficient answer, this Court should attempt a better resolution.

CONCLUSION

The Conference takes no side in the instant dispute. Nonetheless, because the proper interpretation of *Employment Division v. Smith* is raised for this Court's consideration by the parties, the Conference explains why *Smith* should be re-examined and abandoned.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH, FLORIDA

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For The
Eleventh Circuit**

**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by government which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion to the greatest extent permissible in a complex society, whether that interference be from the executive, legislative, or judicial branches of government.

This case is the first opportunity that this Court has had to apply the Free Exercise Clause of the First Amendment after this Court's calamitous decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). The Council believes that this case demonstrates the need to revisit *Smith* and determine whether the analysis utilized by the majority in that decision carries out the purpose of the Free Exercise Clause.

The Council believes that the *Smith* decision brings confusion, rather than clarity, to free exercise juris-

prudence and that the confusion bred by the *Smith* decision infected the Eleventh Circuit's reasoning. For that reason, the Council suggests reversal is appropriate with a remand of this case.

The Council further believes that its broad perspective on the matter of church-state separation and government intrusion into church affairs, as well as its particular knowledge of various religious beliefs and practices, enables it to bring a dimension of analysis before this Court not necessarily presented by the parties.

Both petitioners and respondent, through their respective counsel of record, have consented to the filing of this brief. A general consent letter is on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case demonstrates that the analysis of this Court in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), is not easily applied and brings confusion, rather than clarity, to free exercise jurisprudence. The court of appeals decision thus applied the Free Exercise Clause to an ordinance in a way that distorts the compelling concerns mandated by the First Amendment.

Amicus requests the Court to revisit its decision in *Smith* and limit its holding to criminal laws which are religiously neutral and of general applicability when the religious act is deemed to be *malum in se*. The early decisions of this Court do not justify the establishment of a rigid rule prohibiting any exemption on free exercise grounds from a neutral law of general applicability regardless of the law's impact.

The rule set forth in *Smith* has already been tried in the early 1940s and was found to be unworkable. Except where the act claiming protection is deemed to be *malum in se*, a court should require the government to demonstrate that the opposing interest it asserts is of special importance. And if the government meets that test, it should still show that the governmental interests asserted will *in fact* be substantially harmed by granting an exemption.

An individual asserting a claim for a religious exemption may be required to first demonstrate that the law does not have merely an incidental effect on his religious belief and to further prove that the exemption claimed will not violate the rights of third parties.

ARGUMENTS

I. THIS CASE DEMONSTRATES THAT THE ANALYSIS UTILIZED IN *SMITH* HAS CONFUSED FREE EXERCISE JURISPRUDENCE.

As petitioners have pointed out, "*Employment Division v. Smith* . . . puts the compelling interest test in a new light. *Smith* divides laws restricting religious exercise into those that are religiously neutral and those that are not." Petition for Writ of Certiorari at 17, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3652 (Mar. 24, 1992) (No. 91-948).

This case demonstrates that the Court's analysis in *Smith*, instead of clarifying and providing a more dependable means of determining when governmental action is unconstitutional under the Free Exercise

Clause, has made it more difficult to apply a judicial yardstick.

Although a majority of the Court in *Smith* may have believed that it was a simple task for a court to determine when a legislative enactment may be deemed to be a "neutral generally applicable regulatory law . . .," *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1601 (1990), this case illustrates this not to be so.

The reply brief of petitioners seeking certiorari acknowledged fundamental disagreement over the meaning of the *Smith* opinion. *Id.* at 1. They inquire, "What is a 'neutral and generally applicable law'?" *Id.* at 2.

This case underscores the fact that unless this Court revisits its decision in *Smith*, free exercise rights will depend more on the choice of words utilized in legislation than the aim or purpose of those seeking the legislative enactment.

A religious organization's practices will be permitted or struck down not because of the degree of coercion applied by government or the impact on the public interest resulting from a judicially created exemption but rather by the legerdemain of a legislative body. This is not the stuff of which the Bill of Rights was made.

This first test to the new free exercise analysis promulgated by the majority of the Court cannot properly weigh the delicate and important compelling concerns which this Court must weigh under the mandate of the Religion Clauses of the First Amendment. As pointed out by respondents in their brief in opposition to the petition for certiorari, the court of

appeals here was apparently influenced in its decision by the reasoning in *Smith*. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 10, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3652 (Mar. 24, 1992) (No. 91-948). For the reasons hereinafter stated, we would urge that the Court apply the balancing test which it and many state courts have utilized for 27 years to determine whether the free exercise rights of those here involved have been violated and are entitled to protection from the city's ordinances.

**II. THE COURT'S HOLDING IN SMITH SHOULD BE
RESTRICTED TO CRIMINAL LAWS WHICH ARE
RELIGIOUSLY NEUTRAL AND OF GENERAL
APPLICABILITY WHERE THE RELIGIOUS CLAIM IS
MALUM IN SE.**

In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), this Court refused to apply the compelling state interest/less restrictive alternative test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith* involved the use of an hallucinogenic drug which was deemed a criminal offense under the State of Oregon. The majority found:

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.

110 S. Ct. at 1603. Amicus believes that the instant case presents an opportunity for this Court to consider breathing new life into *Sherbert*.

A review of the early decisions of this Court does not justify the establishment of an arbitrary rule prohibiting any exemption on free exercise grounds from a neutral law of general applicability regardless of the law's impact on religion. In *Reynolds v. United States*, 98 U.S. 145 (1879), the polygamy case cited in the majority opinion in *Smith*, the Court, although rejecting a free exercise exemption for the practice of polygamy, dealt only with a criminal statute and specifically with a practice which the Court stated "has always been odious among the northern and western nations of Europe." *Id.* at 164.

In a subsequent case, *Davis v. Beason*, 133 U.S. 333 (1890), the Court again, in dealing with a criminal statute aimed at the Mormon practice of polygamy, stated:

It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimicable to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, *it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.*

Id. at 342-43 (emphasis supplied).

The Court in *Davis*, however, did recognize that the

first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and *to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others*, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

Id. at 342 (emphasis supplied).

Three points may be adduced from these two similar free exercise cases. One, the Court did not reject out of hand the contention that a free exercise claim may not result in a judicially declared exemption from a religiously neutral statute of general application. Second, the Court only specifically rejected such a claim as it related to a criminal statute. And third, in both cases the acts for which the free exercise right was claimed were considered odious and destructive to society. *Davis*, 133 U.S. at 345. In fact, in *Davis* the Court found:

While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated.

Crime is not the less odious because sanctioned by what any particular sect may designate as "religion."

These two cases therefore may be summarized as holding that a religious practice may not be exempt from the operation of a criminal statute religiously neutral in form and of general applicability where the religious act is deemed to be *malum in se*.

Such a holding is not inconsistent with the view expressed by Justice O'Connor in *Smith*:

Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Smith, 110 S. Ct. at 1611 (O'Connor, J., concurring) (emphasis supplied).

As Justice O'Connor cogently noted:

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.

Id. at 1612 (O'Connor, J., concurring).

In fact, the first case to which this Court applied the Free Exercise Clause to state action involved a

conviction under two separate counts: one under a state statute and one under the common law offense of inciting a breach of the peace. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held "that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment." *Id.* at 303. The *Cantwell* Court, differing substantially from the reasoning in *Smith*, found:

The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act

must have appropriate definition to preserve the enforcement of that protection. *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.*

Id. at 303-04 (emphasis supplied).

The Court in *Cantwell* was obviously embracing a balancing test in its determination when it stated:

The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Id. at 307.

The rule expressed by the Court in *Smith* was previously with us for a short time early in the 1940s but did not withstand subsequent judicial scrutiny. The Court decided *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), a few days after *Cantwell*. That case involved a Jehovah's Witness child refusing to salute the flag for religious reasons. The Court found:

In the judicial enforcement of religious freedom we are concerned with a historic concept. . . . The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against

doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Id. at 594-95.

Significantly, Justice Stone's dissent in *Gobitis* observed the true purpose of the Bill of Rights—that is, the protection of the minority from the will of the majority. He stated:

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

Id. at 604-05 (Stone, J., dissenting).

Justice Stone, in underscoring the importance of the Bill of Rights, observed:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to the justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

Id. at 606.

Two years later in *Jones v. Opelika*, 316 U.S. 584 (1942), this Court wrestled with several cases involving city ordinances imposing license taxes upon the sale of printed matter. In each of these cases, members of the Jehovah's Witness sect were convicted of violating the ordinances. The majority of the Court upheld the convictions although giving lip service to the importance of the Bill of Rights. Chief Justice Stone in his dissent, however, noted that "[t]he First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Four-

teenth Amendments, has put those freedoms in a preferred position." *Id.* at 608 (Stone, C.J., dissenting). In a separate dissent in *Jones*, Justices Black, Douglas, and Murphy, who had previously joined with the majority in the *Gobitis* decision, recanted, stating:

Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that.

Id. at 623-24 (Black, Douglas, Murphy, J., dissenting).

In 1943 the pernicious claim that the legislative will could overpower the rights guaranteed free men and women under the Bill of Rights was swept aside in two decisions. The first case, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), involved a city ordinance imposing a licensing fee on all persons canvassing or soliciting within the municipality. The Court determined that Jehovah's Witnesses operating within the city were exempt from the provision of the ordinance. The Court was not impressed by the fact that the ordinance was of general applicability and did not discriminate on the basis of religion: "The fact that the ordinance is 'non-discriminatory' is immaterial. The protection afforded by the First Amendment is

not so restricted." *Id.* at 115. In *Murdock*, contrary to the majority in *Smith*, the Court found that freedom of religion was not in a subservient position but together with freedom of the press, freedom of speech, was in a preferred position. *Id.*

In the seminal case of *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court specifically reconsidered its precedent decision in *Gobitis*, a case relied upon by the majority in *Smith*. The Court in *Barnette* specifically interred the *Gobitis* decision concluding that the liberties protected by the Bill of Rights were not to be subject only to such protection as a legislative majority might provide. The Court in *Barnette* observed:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

The *Barnette* Court specifically rejected the concept that the legislature by a law religiously neutral and of general application could run roughshod over the religious rights of its people. The Court also rejected the concept that such general legislation could only be tested under a "rational relationship" test. In *Barnette*, the Court observed:

The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger to interests which the state may lawfully protect*. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Id. at 639 (emphasis supplied).

Justice Black's concurrence in *Barnette* correctly noted:

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either *imperatively necessary to protect society as a whole from grave and pressingly imminent dangers* or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at

the substance of religious tenets and practices must be made by this Court.

Id. at 643-44 (Black, J., concurring) (emphasis supplied).

These earlier cases support Justice O'Connor's carefully articulated view that there is no sound basis in precedent for a holding that any facially neutral and uniformly applicable governmental requirement may prevail over a substantial free exercise claim by the government merely showing it to be "a reasonable means of promoting a legitimate public interest." Such a test, according to Justice O'Connor, "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O'Connor, J., dissenting).

As Justice O'Connor has stated:

Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Id. at 728.

Amicus shares the alarm of Justice O'Connor regarding the Court's announcement in *Smith* that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. Amicus also agrees with Justice O'Connor that:

[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.

Smith, 110 S. Ct. at 1613 (O'Connor, J., concurring).

Amicus asks this Court to specifically limit the reasoning set forth in the *Smith* decision to criminal laws which are religiously neutral and of general applicability where the religious claim running afoul of the legislative provision is *malum in se*.

In all other cases, amicus believes that this Court should utilize the free exercise test which over years was developed by this Court and articulated by Justice O'Connor in *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting):

First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

In *United States v. Lee*, 455 U.S. 252, 262 (1982), Justice Stevens articulated the view that "it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." When a statute of general applicability is involved, this amicus would not object if the individual is required preliminarily to prove that his or her religious beliefs and practices are in substantial conflict with a statutory enactment and that an exemption will not result in the violation of rights of third parties. Professor Laycock correctly observed that in the balancing process some consideration may be properly given to the compelling need for the religious exemption. He states:

The [*Smith*] opinion's talk of centrality as a threshold requirement is thus a manufactured difficulty. But the Court is right that any balancing in the free exercise context must consider the burden on religious exercise as well as the threat to government's compelling interests. The Court says it would be unworkable to deny that point, for to deny it would require "the same degree of 'compelling state interest' to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church." But of course no one ever denied the point, and the Court's *reductio ad absurdum* boomerangs. The majority appears to say it would "horrible" and inappropriate for judges to recognize the difference between throwing rice and getting married in church. I think they could handle it.

Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 32.

CONCLUSION

Accordingly, amicus curiae urges this Court to overrule or severely limit application of its decision in *Smith*, reverse the judgment of the court of appeals, and remand for further consideration.

Dated: May 26, 1992 Respectfully submitted,

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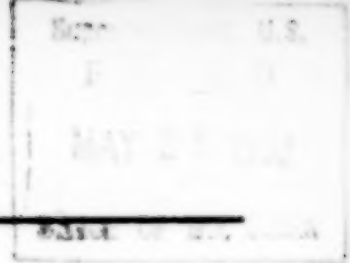
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No. 91-948



**In The
Supreme Court of the United States
October Term, 1991**

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW
AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE***

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**BRIEF OF THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
("COLPA") AS *AMICUS CURIAE***

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that has, over the past quarter century, represented the interests of America's Orthodox Jewish Community before courts, legislatures, and other governmental bodies.¹ COLPA has filed *amicus curiae*

¹COLPA has represented the full range of major national rabbinic, congregational and educational organizations within the Orthodox community. These include, and this *amicus* brief is submitted on behalf of,

- a. Agudath Harabonim of the United States and Canada;
- b. Agudath Israel of America;
- c. National Council of Young Israel;

briefs in this Court in many of the leading religious freedom cases decided since COLPA's formation. COLPA files this brief because the particular subject of this litigation and its broad constitutional implications raise issues of great consequence to many Americans of the Jewish faith.

The most immediate practical consequence is that affirmance by this Court of the court of appeals' judgment could jeopardize the availability of kosher food in the United States. Meat and poultry is kosher only if derived from an animal slaughtered in accordance with rabbinic requirements that have been obligatory upon Jews for more than two thousand years—*i.e.*, by the prescribed Jewish ritual method of *shehitah*.³ The Federal Humane Slaughter Act of 1958 (7 U.S.C. §1902(b)) unequivocally recognizes *shehitah* as a humane method of slaughtering

- d. The Rabbinical Alliance of America;
- e. The Rabbinical Council of America;
- f. Torah Umesorah, National Society of Hebrew Day Schools;
- g. The Union of Orthodox Jewish Congregations of America; and
- h. The Union of Orthodox Rabbis of the United States and Canada.

³*Shehitah* is a method of slaughter whereby an animal's carotid arteries are suddenly severed with a sharp knife. In *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974), a three-judge district court (including Circuit Judge Henry J. Friendly) upheld the constitutionality of the provision of the Federal Humane Slaughter Act, 7 U.S.C. §1902(b), that recognizes *shehitah* as complying with federal public policy. The court said (374 F. Supp. at 1291; footnotes omitted):

Congress considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter, was a humane method. . . . Jewish ritual slaughter, as a fundamental aspect of Jewish religious practice, was historically related to considerations of humaneness in times when such concerns were practically non-existent.

animals for food and rejects the canard that *shehitah* is inhumane. Florida law similarly preserves the right to practice *shehitah* in language that tracks the Federal Humane Slaughter Act. See Fla. Stat. Ann. §828.23(7)(b).

The ordinances at issue in this case do not involve or affect Jewish ritual slaughter. But there are those—including the respondent's expert trial witness—who favor prohibiting or restricting *shehitah*. And if a state or a municipality were persuaded by those interests to prohibit or restrict *shehitah*, such a law likely would be defended against constitutional challenge on some of the same grounds invoked here to support Hialeah's ordinances. It is staggering to think that in this nation, founded as a refuge from religious persecution, the availability of kosher meat could or would be restricted or inhibited. An affirmance of the decision below would raise that frightening specter.⁴

A broader basis for our concern relates to the general constitutional principles that govern the outcome of this case. Jewish communal agencies—particularly Orthodox organizations that promote Jewish adherence to religious observance and ritual—are still reeling from this Court's wholly unexpected decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Many centuries-old observances of the Jewish faith have been placed in jeopardy by

⁴It is noteworthy that among the very first anti-Jewish laws enacted by the Nazi regime under Adolf Hitler were laws outlawing *shehitah* on the ground that it was cruel to animals. On April 21, 1933, Hitler, as the new Chancellor of the Third Reich, signed a decree (a) abrogating a 1917 German law that had permitted *shehitah* and (b) prohibiting the slaughter of animals without prior stunning that would render them unconscious. See Lewin, Munk & Berman, *Religious Freedom: The Right to Practice Shehitah*, pp. 15, 73-77 (1946).

Smith's surprise declaration that a "valid and neutral law of general applicability" may constitutionally override a mandated religious observance even in the absence of any "compelling governmental interest."

While we are dismayed at the Court's *Smith* decision and fervently hope that the Court will reconsider and/or limit that ruling, the decision below is erroneous and must be reversed even under *Smith's* looser constitutional standard. The ordinances challenged in this case are not, like Oregon's drug laws, applicable across-the-board to all persons within the jurisdiction. Hialeah's animal sacrifice prohibitions are narrowly focused legislation, plainly aimed at a distinctive group that is identified by its adherence to a particular religious doctrine. The constitutional latitude *Smith* afforded local legislation that inhibits religious practices should not apply to laws, even if technically "neutral" on their face, that plainly are directed at readily identifiable religious minorities.

Further, Hialeah's ordinances are not "neutral" laws within the meaning of *Smith*. The municipality's resolutions and ordinances distinguish between conduct that is permitted and conduct that is forbidden on the basis of the actor's religious motivation. Residents of Hialeah are at liberty to kill animals for wholly secular reasons, but they may not do so when the same form of killing is done for "public ritualistic animal sacrifices" (City of Hialeah Resolution No. 87-90), for "any type of ritual" (City of Hialeah Ordinance No. 87-52), or "in a public or private ritual or ceremony" (City of Hialeah Ordinance No. 87-71). This is, therefore, the archetype of laws that prohibit conduct "engaged in for religious reasons, or only because of the religious belief that they display." *Employment Division v. Smith*, 494 U.S. at 877. The ordinances

must thus be invalidated even if the new doctrine announced in the *Smith* majority opinion is given an expansive reading.

Under this analysis, adopted by the majority in *Smith*, it is irrelevant whether there is a compelling governmental necessity to prohibit the conduct that is the subject of the ordinances. If discrimination between secular and religiously motivated conduct is established, a law that punishes only the latter is *ipso facto* constitutionally void.

We conclude this *amicus* brief on a note of foreboding. Reversal of the decision of the courts below on the grounds we have described would do little to mitigate the harm done to the freedom of religious minorities by *Smith*. Nor can reversal on the formalistic grounds described above be taken as proof that, even after *Smith*, there is real vitality left in the Free Exercise Clause. A constitutional rule that conditions the legitimacy of a statute on whether it *explicitly* treats religious observances differently from identical conduct engaged in for secular purposes is a flimsy shield for the freedom of religious observers. With little sophistication, legislatures may draft laws that prohibit or restrict religious practices in "neutral" terms, avoiding specific reference to "ritual" or "ceremony." The ultimate test of such legislation must be its actual impact on religiously motivated conduct. If it inhibits any observance of one's faith, an exemption should be constitutionally prescribed unless granting such an exemption would unduly interfere with the realization of an important governmental objective.

ARGUMENT

I.

THE HIALEAH ORDINANCES ARE SPECIFICALLY DIRECTED AGAINST RELIGIOUS PRACTICE AND ARE UNCONSTITUTIONAL UNDER *EMPLOYMENT DIVISION v. SMITH*

A. The Hialeah Ordinances Are Not "Generally Applicable Regulatory" Laws.

This Court's decision in *Employment Division v. Smith* held that an individual could claim no constitutional exemption, on grounds of his religious tenets, from a "neutral, generally applicable regulatory law" (494 U.S. at 880) that governs the conduct of all other persons. The majority opinion referred to the fact that Oregon's drug-control statute was an "across-the-board criminal prohibition," 494 U.S. at 884, and repeatedly defined its newly articulated constitutional guideline as applicable to claimed exemptions from "generally applicable" laws. See 494 U.S. at 878, 879, 880, 881, 882, 884, 885. The Court also emphasized "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct" (494 U.S. at 885)—government activity that should be given broad latitude.

Hialeah's ordinances can stake no claim to being laws of "general applicability." The district court found that the Hialeah City Council enacted the ordinances "in a mob atmosphere" (Pet. App. A27) "[j]ust after the Church began to organize and to prepare the [church] . . . for occupancy" (Pet. alp.; A22). See also Pet. App. A38 ("Defendant acknowledges that the challenged ordinances

arose in response to the opening of Plaintiff Church in the City."). Hialeah's ordinances cannot be described as laws imposed "across-the-board" to meet a broad societal need because the entire "board" covered by Hialeah's ordinances consists of the petitioners.

The district court acknowledged that Hialeah's "ordinances are not religiously neutral" (Pet. App. A23) and that "the evidence established . . . that the council members' intent was to stop the practice of animal sacrifice in the city" (Pet. App. A28). The district court nonetheless upheld the ordinances -- and the Eleventh Circuit affirmed -- on the unprecedented theory that "nothing in the First Amendment prevents a municipality from specifically regulating such conduct when it is deemed inconsistent with public health and welfare." Pet. App. A40.

The decisions of this Court on which the majority relied in *Smith* all involved legislation responsive to a broad societal need that was made uniformly applicable to *all* constituencies and was not enacted to restrict a particular group's religious exercise. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (criminal laws against polygamy); *United States v. Lee*, 455 U.S. 252 (1982) (mandatory payment of social security taxes); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor laws); *Gillette v. United States*, 401 U.S. 437 (1971) (military selective service regulations).

The Court's *Smith* opinion insulates only legislation of "general applicability," but condemns legislation that is "specifically directed at . . . religious practice" or has as its "object" the restriction of religious exercise. 494 U.S. at 878. By singling out a religious group or practice for special prohibition, the Hialeah ordinances epitomize the

sort of legislation that *Smith* disapproved. Religious believers do not, in such a case, incur "the incidental effect of a generally applicable and otherwise valid provision" (494 U.S. at 878). They are the exclusive targets of the criminal prohibition.

B. The Hialeah Ordinances Are Unconstitutional Because They Explicitly Prohibit Conduct When It Is "Engaged In For Religious Reasons."

This Court's majority opinion in *Smith* declared it to be "true . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." 494 U.S. at 877. The series of Hialeah resolutions and ordinances involved in this case clearly fall within that constitutionally forbidden category.

(1) On June 9, 1987, Hialeah adopted Resolution No. 87-66 (Pet. App. A55), which was explicitly aimed at "certain religions" that "propose to engage in practices which are inconsistent with public morals, peace or safety." On the same day, the City Council adopted Ordinance No. 87-40 (Pet. App. A52), directed to "the potential for animal sacrifices." It is patent from both of these initial pronouncements that a religiously motivated practice was being singled out for official condemnation.

(2) On August 11, 1987, the City Council adopted Resolution No. 87-90 (Pet. App. A55-A56), which again expressed concern over "the possibility of public ritualistic animal sacrifices." The Resolution declared the City's policy "to oppose the ritual sacrifices of animals within the City of Hialeah, Florida" and the City's intent to pro-

secute any individual or organization "that seeks to practice animal sacrifice." The Resolution was not directed at objectively described conduct -- *i.e.*, the killing of animals in a particular manner. Rather, the language of the August 11 Resolution expressly limits the City's policy and its assurance of prosecution to "acts . . . engaged in for religious reasons." An individual who kills an animal for a reason other than "public ritualistic animal sacrifice" -- even if the killing is done by the very same method that is used for sacrifice -- is not subject to the City's policy or to the assurance of criminal prosecution.

(3) On September 8, 1987, the City Council adopted another ordinance, Ordinance 87-52 (Pet. App. A52-A53). Once more, it focused on "the possibility of public ritualistic animal sacrifices." The Ordinance defined "sacrifice" to mean "a public or private ritual or ceremony not for the primary purpose of food consumption," and it forbade possession of animals by "any group or individual that kills, slaughters or sacrifices animals *for any type of ritual*, regardless or whether or not the flesh or blood of the animal is to be consumed" (emphasis added).

Ordinance 87-52 applies, by its literal terms, only to possession that is incident to "any type of ritual." Possession of an animal by hunters, trappers, pet-owners, humane societies, veterinarians, research scientists, exterminators or taxidermists is not prohibited. Nor is there any restriction on possession of an animal that is to be killed for scientific purposes, for taxidermy, or even for sadistic enjoyment. Indeed, bare possession of an animal -- unaccompanied by additional conduct such as torture or killing -- is not otherwise illegal under Florida law. Under Ordinance 87-52, however, it is illegal for an individual or group that engages in animal sacrifice (*i.e.*, an individual

or group acting "for religious reasons") to keep an animal.

(4) On September 27, 1987, the Hialeah City Council adopted a final set of Ordinances -- Nos. 87-71 and 87-72 (Pet. App. A53-A54). The first explicitly refers to animal sacrifice, defined in terms customarily associated with religious observance -- killing an animal "in a public or private ritual or ceremony" The second Ordinance, No. 87-72, is the only one in the series of four Ordinances and two Resolutions that contains no explicit reference to ritual or ceremony. In the context of the five other official City pronouncements, however, there can be no doubt that Ordinance No. 87-72 is directed at conduct "engaged in for religious reasons."

The consequence of this series of Ordinances and Resolutions is that the killing of animals in Hialeah for ritual or ceremonial reasons is prohibited, while identical killing for secular reasons is permitted. That is an impermissible and unconstitutional form of discrimination under *Smith*. Regardless of the weight of the governmental justification for the ordinances, they may not be enforced by the City because enforcing them would be tantamount to prohibiting the free exercise of religion.⁴

⁴Even if a compelling governmental interest could justify legislation that is specifically directed against religious conduct—and there is no indication in *Smith* that it can—the City of Hialeah demonstrated no such compelling interest before the district court, least of all its purported interest in preventing cruelty to animals. See *infra* pp. 15-16.

II.

UNDER THIS COURT'S NEW *SMITH* STANDARD, EVEN THE MOST COMPELLING GOVERNMENTAL INTEREST IS IMMATERIAL ONCE IT IS SHOWN THAT THE LEGISLATION SINGLES OUT CONDUCT "ENGAGED IN FOR RELIGIOUS REASONS"

The standard announced in *Smith* asks whether the challenged governmental action bars conduct "only when . . . engaged in for religious reasons." Under this analysis it makes no difference how compelling the government's interest may be in prohibiting the religious practice. Even if it can be shown that a governmental interest of the greatest magnitude justifies a legislative prohibition, the law's distinction between conduct that has secular motivations and conduct that is prompted by religious conscience renders it invalid. The underlying theory is plain: If the legislative concern truly were compelling, the legislature should not limit the prohibition to acts "engaged in for religious reasons" and should extend the prohibition to the identical conduct when occasioned by secular motives.

In this respect, the new *Smith* standard tracks the constitutional standard customarily applied to Equal Protection challenges. If a statutory distinction in a criminal law is arbitrary or impermissible under the Equal Protection Clause, it makes no difference how compelling a governmental interest supports the prohibition. If the legislature has arbitrarily subjected a particularly defined class of persons or activity to prohibitions or restrictions that rationally should be applied to a larger universe -- *i.e.*, if the law is impermissibly underinclusive -- the narrow prohibition is invalid. See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Police Dep't. of Chicago v. Mosley*, 408

U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). Cf. *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991) (infringement on First Amendment activity cannot be justified by a purported interest that government does not pursue in comparable secular contexts).

For this reason, once the Court determines -- as it must -- that Hialeah's ordinances draw an impermissible distinction between religiously motivated conduct and the same conduct engaged in for secular purposes, it is unnecessary for the Court to weigh Hialeah's governmental interest in prohibiting Santerian animal sacrifices. Even if Hialeah could justify an across-the-board prohibition on the killing of animals, it would be obligated to enact a neutral law that does not distinguish between the conduct as part of a "ritual," "ceremony" or "religion," and the same conduct undertaken as part of a secularly motivated course of action.

III.

THE SMITH STANDARD ELEVATES FORM OVER SUBSTANCE AND ENDANGERS RELIGIOUS FREEDOM

In the preceding pages, we have analyzed Hialeah's ordinances under this Court's new standard as articulated in *Smith*. The result -- invalidation of Hialeah's ordinances -- necessarily follows from an application of that standard, regardless of the harm inflicted on the residents of Hialeah by the animal sacrifice practices of the petitioners.

This analysis is deficient, however, because it emphasizes form and ignores substance. Had Hialeah more

cleverly drafted its Resolutions and Ordinances and not made specific reference to "ritual," "ceremony," or "religion," its legislation could have passed constitutional muster under *Smith*. Indeed, "neutral" laws having the identical effect could, under the *Smith* test, be adopted tomorrow by Hialeah or other municipalities. And, what is of paramount concern to this *amicus*, a state or municipality similarly could enact a law prohibiting Jewish ritual slaughter without mentioning religion or ritual. A simple prohibition of the method of *shehitah* -- slaughter with a knife that severs the animal's carotid arteries -- would outlaw *shehitah* without appearing to distinguish between conduct that is "engaged in for religious reasons" and conduct that is secularly motivated.

If a legislature were to enact a law that would, in this manner, prohibit a central established tenet -- such as *shehitah* -- of a universally respected religion, and if there were no recourse in the courts against such official intolerance, the Bill of Rights' guarantee of the free exercise of religion would be reduced to sham and pretense. Such an event would shame the Founding Fathers, who envisioned this nation as a reliable refuge from religious persecution.

We recognize the concerns that the Court expressed in *Smith* and acknowledge, as the majority observed (494 U.S. at 883-84), that even while the Court paid lip service to the "compelling governmental interest" test, it frequently rejected Free Exercise claims outside the unemployment compensation context.³ We believe,

³The Court failed, however, in its *Smith* opinion to take account of the importance of retaining the "compelling governmental interest" standard to prevent discrimination against religious minorities on the many levels of government below this Court. No

however, that the reason for those rejections of claims made by conscientious religious observers is that the Court had been erroneously weighing overall governmental policy to determine whether the interest was "compelling," rather than evaluating the consequences to that interest of permitting an individual exemption. The Court noted in *Smith* that the "compelling government interest" test had been borrowed "from other fields" (494 U.S. at 885), and we agree that fitting that standard to the issue of constitutionally mandated religious exemptions presents difficulties. It is frequently true that a program of government regulation may be "compelling" or indispensable. Nonetheless, an individual exemption might be wholly benign and would not compromise the important government program in the slightest degree.

Accordingly, if this Court has finally determined to jettison the "compelling government interest" test in the area of free exercise of religion, we urge it to adopt a more substantive and meaningful standard for judging claims for individual exemptions from "neutral laws of general applicability." The test that gives appropriate weight to the governmental and to the individual interests must be one that turns on the effect of an individual exemption. Namely, will an exemption for the religious observer materially impede achievement of the important governmental objective sought by a neutral across-the-board

matter how unsuccessful the invocation of the "compelling governmental interest" test may have appeared in the *United States Reports*, it was respected by government bureaucrats and lower courts until it was eradicated by *Smith*. Many individuals who were threatened with wholly arbitrary and unjustified religious discrimination were significantly assisted by the pre-*Smith* requirement that any restriction of a religious observance had to be justified by a "compelling governmental interest." Since the decision in the *Smith* case, reasonable accommodations for religious observance by governmental personnel are much more difficult to achieve.

legal requirement? If so, the exemption, albeit based on a constitutionally protected right, should be overridden. If not, the Bill of Rights, with its guarantee for "free exercise" of religion, must prevail.⁶

Under this analysis, the "compelling government interest" test would be retained in only one context—that is, when a state or local law is aimed, in form or in substance, at the practices of a religious group, such that an exemption for the religious group would obviously swallow up the rule. Under our proposed constitutional standard (but not under the *Smith* standard), Hialeah's ordinances still could withstand constitutional attack if the Court were satisfied that the various interests enumerated in the district court's opinion (Pet. App. A42-A47) qualified as "compelling governmental interests."

It is our view, however, that none of the interests which Hialeah raised below justify the ordinances' restriction on religious practice. Were these interests truly compelling, Hialeah undoubtedly would have enforced these or similar ordinances in secular contexts -- something it has failed to do. In addition, this Court has required that legislation which inhibits free exercise must represent "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Hialeah has made no showing that its interests could not have been achieved through less restrictive means, such as by regulating the disposal of animal carcasses and remains and by preventing children below an appropriate age from witnessing animal sacrifice.⁷

⁶See *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981) (exemption mandated unless it would "seriously affect" governmental interest); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

⁷The Court of Appeals, it should be noted, explicitly omitted the "welfare of children" factor from its bases for affirmance. Pet. App. A2.

This *amicus* takes particular exception with the district court's conclusion that the prevention of cruelty to animals is a compelling interest that overcomes religious convictions. Requiring a person to violate divine commands that govern his conscience is exceedingly "cruel" to a human being. A municipality's interest in preventing "cruelty" to an animal is, we submit, inadequate to justify perpetrating "cruelty" on sincere conscientious believers. While we are confident that any objective evaluation of Jewish ritual slaughter would arrive at the same conclusion that Congress reached in 1958 -- *i.e.*, that *shehitah* is a wholly humane method -- the future of *shehitah* in the United States should not depend on whether every state legislature or city council eternally agrees with this conclusion. If, by some miscalculation, a jurisdiction were to conclude otherwise, that judgment alone -- *i.e.*, that the method is "cruel" to animals -- should not override honestly held religious beliefs in a country where the "free exercise" of religion is among the first liberties specified in the Bill of Rights.

The outcome of a compelling interest analysis notwithstanding, the effect of *Smith* is to make those considerations irrelevant. Under the constitutional test articulated in *Smith*, the Hialeah ordinances are constitutionally invalid because they are not "generally applicable" and because they single out religiously motivated conduct.

CONCLUSION

For the foregoing reasons, we urge the Court to limit *Smith* to its facts and to articulate a new constitutional standard that would provide greater constitutional protection for minority religious observance. Even if the Court elected to apply the new *Smith* standard, however, the Court should invalidate Hialeah's ordinances under the Free Exercise Clause.

Respectfully submitted,

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MAY 26 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNEST PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

On Writ Of Certiorari To The United States Court Of
Appeals For The Eleventh Circuit

Brief Amicus Curiae Of Americans United
For Separation Of Church And State,
James Andrews As Stated Clerk Of The
General Assembly Of The Presbyterian
Church, (U.S.A.), The American Jewish Committee,
The American Jewish Congress, The Anti-Defamation
League Of B'nai B'rith, The Baptist Joint Committee
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QUESTIONS PRESENTED

Whether city ordinances specifically directed at the sacrifice of animals in a religious ritual, while permitting the killing of animals for such other purposes as food, science, convenience, or sport, violate the Free Exercise Clause of the First Amendment.

Whether the Court should reconsider its teaching in *Employment Division v. Smith* that the Free Exercise Clause protects only against official discrimination against an unpopular minority such as that manifested here, and does not protect the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety.

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CASES CITED:	
Bethel Evangelical Lutheran Church v. Village of Morton, 201 Ill. App. 3d 858, 559 N.E. 2d 533 (1990)	22
Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	26, 28
County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991)	26
Doe v. Bolton, 410 U.S. 179 (1973)	20
Employment Division v. Smith, 494 U.S. 872 (1990) <i>passim</i>	
Hunafa v. Murphy, 907 F. 2d 46 (7th Cir. 1990).....	21
In re Jenison, 375 U.S. 14 (1963), on remand, 267 Minn. 136, 125 N.W. 2d 588 (1963).....	24
Kahane v. Carlson, 527 F. 2d 492 (2d Cir. 1975)	24
Kentucky State Bd. for Elementary & Secondary Ed. v. Rudasill, 589 S.W. 2d 877 (Ky. 1979).....	24
Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890)	19
Medeiros v. Kiyosaki, 478 P. 2d 314 (Hawaii 1970)	24
Minersville School District v. Gobitis, 310 U.S. 586 (1940)	18
Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990)	21

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People v. Philips (N.Y. Ct. of Gen. Sessions 1813)	24
Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949)	15
St. Agnes Hospital v. Riddick, 748 F. Supp. 319 (D. Md. 1990)	20, 24
Sherbert v. Verner, 374 U.S. 398 (1963)	12
Smith v. Ricci, 89 N.J. 514, 446 A. 2d 502 (1982)	24
You Vang Yang v. Sturner, 728 F. Supp. 845 (D.R.I. 1990), <i>reconsidered and dismissed</i> , 750 F. Supp. 558 (D.R.I. 1990)	21
Walker v. First Orthodox Presbyterian Church of San Francisco, 22 FEP Cases 762 (Cal. Super. Ct. 1980)	24
Walker v. Superior Court, 47 Cal. 3d 112, 763 P. 2d 852 (1988)	24
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	18
OTHER AUTHORITIES:	
1 <i>Annals of Congress</i> 757 (Aug. 15, 1789)	29
W. Berns, <i>The First Amendment and the Future of American Democracy</i> (1985)	9
<i>Cong. Globe</i> , 38th Cong., 1st Sess. 1199 (1863)	29
<i>Cong. Globe</i> , 39th Cong., 1st Sess. 474 (1865)	29
<i>Cong. Globe</i> , 42d Cong., 1st Sess. 84 (app.) (1871)	29
Day, "Sacrifice," 14 <i>Encyclopedia Judaica</i> (1971)	7

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Declaration of Independence, 1 Stat. 1 (1776)	10
Dep't of Justice, Immigration and Naturalization Service, <i>Basic Law Manual Asylum: A Training Manual for Immigration and Naturalization Offi- cers</i> (1991)	23
Dep't of Justice, Office of Legal Policy, <i>Report to the Attorney General: Religious Liberty under the Free Exercise Clause</i> (1986)	26
R. deVaux, <i>Ancient Israel: Its Life and Institutions</i> (1961)	5
R. deVaux, <i>Studies in Old Testament Sacrifice</i> (1964)	5
Duncan, "Gay Rights: A Scud Attack on Religion," <i>Legal Times</i> , Apr. 20, 1992, at 25	25
Cole Durham, Mary Anne Wood, and Spencer Condie, <i>Accommodation of Conscientious Objec- tion to Abortion: A Case Study of the Nursing Profession</i> , 1982 <i>Brigham Young L. Rev.</i> 253	24
Fla. Att'y. Gen. Opin. 87-56	11
Fla. Stat. Ann. § 828.22(3)	11
Gaster, "Sacrifices and Offerings, OT," 4 <i>Inter- preter's Dictionary of the Bible</i> (1962)	5
Giannella, <i>Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Lib- erty Guarantee</i> , 80 <i>Harv. L. Rev.</i> 1381 (1967)	29
Glassé, "Id al-Adha," "Sacrifice," <i>The Concise Encyclopedia of Islam</i> (1989)	6
P. Irons, <i>The Courage of Their Convictions</i> (1988)	18

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Jacobson, "Edwards Needs Sensitivity," <i>Newsday</i> , Nov. 10, 1989, at 165	24
Kmiec, <i>The Original Understanding of the Free Exer- cise Clause and Religious Diversity</i> , 59 UMKC L. Rev. 591 (1991)	26
Laycock, <i>The Remnants of Free Exercise</i> , 1990 Sup. Ct. Rev. 1	17
J. Locke, "A Letter Concerning Toleration," 35 <i>Great Books of the Western World</i> (R. Hutchins ed. 1952).	10
J. Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> , 330 U.S. 63 (1947).....	8, 10
9 <i>Writings of James Madison</i> (G. Hunt ed. 1901).....	28
M. Malbin, <i>Religion and Politics: The Intentions of the Authors of the First Amendment</i> (1978).....	9
D. Manwaring, <i>Render Unto Caesar: The Flag-Salute Controversy</i> (1962)	19
McConnell, <i>The Origins and Historical Understand- ing of Free Exercise of Religion</i> , 103 Harv. L. Rev. 1409 (1990)	9, 26, 27
Murphy, "Santería," 13 <i>Encyclopedia of Religion</i> 66 (M. Eliade ed. 1987).....	4, 5
R. Niebuhr, "Here Is the Church," <i>Wall Street J.</i> (Nov. 20, 1991)	22
J. Noonan, <i>The Believer and the Powers that Are</i> (1987)	19
OSHA Notice CPL 2 (Nov. 5, 1990)	22

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Ordinances of the City of Hialeah:	
87-40	11, 13, 14
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B. Poore, ed., 1 <i>Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States</i> (1878).....	27
"Professor Criticized for Exam on Yom Kippur," <i>New York Times</i> , Oct. 14, 1989, § 1, at 26	24
Sam Roberts, "Fight City Hall? Nope, Not Even Mother Teresa," <i>New York Times</i> (Sept. 17, 1990)	21
Schimmel, "Islamic Religious Year," 7 <i>Encyclopedia of Religion</i> 456 (M. Eliade ed. 1987)	6
<i>The Williamsburg Charter</i> , 8 J. Law & Relig. 5 (1990) ..	1, 30

INTERESTS OF AMICI CURIAE

Amici curiae are religious organizations or civil rights organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. None of the *amici* espouses or endorses the doctrines or practices of petitioners, and many of the *amici* consider those practices repugnant for moral and religious reasons. Nonetheless, *amici* are committed to the proposition that all sincere religious practices are presumptively entitled to the protection of the Constitution, within only those limits that are required for the protection of the public welfare. We are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." *Williamsburg Charter*, reprinted in 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 877-878 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case involves a series of ordinances passed by the City Council of Hialeah, Florida, in June and September, 1987. These ordinances were specifically enacted for the purpose of halting petitioner's exercise of religion and mode of worship – the ancient practice of ritual sacrifice of animals on special occasions of religious significance – within the precincts of Hialeah. The ordinances challenged here do not take the form of a generally applicable norm from which the petitioners seek special exemption. Neither Hialeah nor the State of Florida generally prohibits the killing of animals. Anyone can kill an animal in Florida for sport, food, convenience, or profit; but they cannot kill an animal as an exercise of religious worship. One can get Chicken McNuggets® in Hialeah, but one may not partake of chicken roasted at a religious service of the Santería faith.

The reasons invoked by the City relate to cruelty to animals, public health, and zoning. But neither Hialeah nor the State of Florida prohibits the killing of animals under secular circumstances that raise identical (or even more serious) concerns of cruelty, public health, or zoning. The ordinances are thus "specifically directed at [petitioners'] religious practice" and are therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990).

Amici wish to make four related points. First, the practice of animal sacrifice, though contrary to the religious convictions of many, is an ancient, long-standing, well-established, sincere religious practice. Indeed, the sort of animal sacrifice practiced by the Church of the Lukumi Babalu Aye is not dissimilar to the practices ordained for the people of Israel by the Holy Bible and

the people of Islam by the Qur'an, although the underlying theological bases for the practices are quite different. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires governmental neutrality toward religion. Although the district court expressly found that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah," Pet. App. 23, it nonetheless upheld the ordinances.¹ Third, the purported governmental interests invoked by the district court are insufficient as a matter of law because they do not justify the disparate treatment meted out to those who kill animals out of obedience to religious command and those who kill animals for food, science, pest control, animal population control, or sport. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. As this case illustrates, after *Smith* lower courts have often demonstrated indifference to the impact of government action against vulnerable religious minorities, even when it takes the form, as in this case, of invidious discrimination or overt hostility. As this Court considers the future course of constitutional doctrine in the area of religious freedom, *amici* wish the Court to be aware of the practical consequences of constitutional rules that turn a blind eye toward the realities of official treatment of unfamiliar and unpopular religious groups, particularly

¹ Reference is frequently made in this brief to the opinion of the district court because the court of appeals largely adopted the analysis of the district court in an unpublished per curiam order. Pet. App. 2.

at the local level. In the view of the *amici*, the history and purpose of the Free Exercise Clause requires that it be construed to provide maximum freedom for religious practice consistent with the demand of public order.

ARGUMENT

I. THE CHALLENGED ORDINANCES FORBID SINCERE RELIGIOUS PRACTICES THAT ARE INTEGRAL TO LONG-ESTABLISHED AND SINCERELY HELD RELIGIOUS BELIEFS

This case concerns the religious practices and beliefs of the Church of the Lukumi Babalu Aye and its members in Hialeah, Florida. The church and its members practice a religion known as Santería, a syncretistic branch of a millennia-old West African religion known as Yoruba or Yoba. The descendants of West African slaves in Cuba and other Latin American countries blended the beliefs and practices remembered from their ancient homeland in Africa with names and symbols taken from the folk piety of the Roman Catholic Church. It is not, however, a "branch" of Catholicism. For example, ancient Yoruba gods were given the names of Catholic saints (hence the name of the adherents, *santeros*, and of the religion, Santería). See Joseph Murphy, "Santería," 13 *Encyclopedia of Religion* 66 (Mircea Eliade ed. 1987).

Santería was officially persecuted in Cuba by Spanish and post-colonial authorities, as it is by the current regime; but the religion persisted underground for some 400 years and spread throughout the Caribbean. Santería came to this country with Cuban exiles who fled the Castro regime. There are over 50,000 adherents of Santería in southern Florida, and many more adherents of

this faith in the New York metropolitan area. In its various forms, there are probably a hundred million believers worldwide.

Although personally and religiously abhorrent to many Americans, animal sacrifice remains an integral part of the Santería religion, and of other religions, including Islam, around the world. In Santería, small animals are sacrificed in connection with many important rituals, such as birth, marriage and death rites. It is essential in the rite of initiation of new priests of the faith, known as *babalawos*. It is likewise at the heart of the *santeros'* concept of communion or spiritual relationship with the sacred spirits known as *orishas*; this communion is established through the symbolism of shared food, including cakes, fruits, and parts of a sacrificed animal. "The slaughter is always performed quickly and cleanly according to ritual rules, and the flesh is nearly always cooked and consumed by the congregation as part of the *orisha's* feast." Murphy, "Santería," *id.*

The roots of the practice of animal sacrifice are at least 4,000 years old. They lie in the ancient history of what are now Judaism, Christianity, and Islam. Indeed, the practices that Hialeah seeks to prohibit are virtually indistinguishable with the practices of animal sacrifice mentioned throughout the Bible. *Leviticus* 1-7 (the requirements in Torah for animal sacrifice); *1 Kings* 8:62-66 (animal sacrifice at the dedication of Solomon's temple); see Roland deVaux, *Ancient Israel: Its Life and Institutions* 415-23 (1961); Roland deVaux, *Studies in Old Testament Sacrifice* (1964); Gaster, "Sacrifices and Offerings, OT," in 4 *Interpreter's Dictionary of the Bible* 147-59 (1962) (collecting and discussing Biblical texts referring to animal sacrifice). In Islamic faith the indiscriminate

killing of animals for sport is prohibited in the *Hadith* (Sayings of the Prophet Muhammad), but the ritual sacrifice of animals is sometimes required. For example, on the festival known as *Id al-Adha*, devout Muslims throughout the world join the pilgrims in Mina in sacrificing a small animal in remembrance of the sacrifice of a ram by Abraham in place of his son Ishmael. The roasted flesh of the sacrificed animal is distributed to the poor for them to eat. *The Qur'an* 37:102; see Glassé, "Id al-Adha," "Sacrifice," *The Concise Encyclopedia of Islam* 178, 340 (1989); Schimmel, "Islamic Religious Year," 7 *Encyclopedia of Religion* 456 (Mircea Eliade ed. 1987).

Profound theological reasons – having nothing to do with cruelty to animals – explain why animal sacrifice was abandoned in the first century of the common era by Jews and Christians. But those theological reasons do not bind the Church of the Lukumi Babalu Aye and must not be imposed upon them. In the Jewish faith, sacrifice was abandoned when the Romans destroyed the Second Temple in 70 C.E.,² but some Jewish authorities maintain that

² Worship in ancient Israel occurred at several shrines. After the reform initiated under King Josiah (640-609 B.C.E.), however, the priestly and sacrificial functions were exclusively tied to the Jerusalem Temple and could not be performed elsewhere (*Deut.* 12:1-13). The Temple of Solomon was destroyed by the Babylonians in 587 B.C.E., but rebuilt after the return from the exile in 535 B.C.E. (*Ezra*, *Nehemiah*, and *Haggai*). The Romans destroyed this Second Temple in 70 C.E., again making the priestly practices, including the sacrifices, impossible, as they remain to this day. Samaritans, who claim to represent the northern tribes of Israel and who believe that Mount Gerizim rather than Mount Zion is the proper center of religious devotion, continue the ancient practice of sacrificing the passover lambs at that location to this day.

sacrifice must be resumed in some form if and when the Temple is restored. See Day, "Sacrifice," 14 *Encyclopedia Judaica* 614-15 (1971). In the initial stage of the early Christian church, little thought was given to differentiating the new religion from Judaism; thus the Christians in Jerusalem "went to the Temple every day" (*Acts* 2:46), perhaps continuing the same participation in animal sacrifice that was practiced by Jesus, Mary, and Joseph (*Luke* 2:22-24). At least by the year 70, however, the practice of animal sacrifice among Christians was abandoned not simply because the Temple was destroyed in that year, but also because of the theological view that further sacrifice was rendered forever unnecessary by the ultimate sacrifice of the pure Lamb of God on the cross at Calvary (*Letter to the Hebrews* 7:27; 9:1-23; 10:1-10; *I Peter* 1:18-19; *I John* 1:7; 2:2; *Rev.* 5:9; 7:14; 12:11).

These theological developments make many in the Christian and Jewish faiths reluctant to defend a practice today that is so foreign to their own doctrines. But the sensibilities of the majority are no test of religious truth, and members of minority religions have no less right to practice their faith merely because others recoil from it. The City, the State Attorney General, and the district court have no business labeling any religious practice "unnecessary" for a particular religious tradition. The City may have valid, if not compelling, health and safety concerns that could support a generally applicable ordinance regulating all killing of animals. But that is vastly different from telling a religious body whether its age-old religious practices are "necessary." Viewed from the only perspective permitted under the First Amendment – that of the Santería adherents – sacrifice is a vital and indispensable component of their worship.

Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to practice their rituals as they have been extant for 4,000 years. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 15, reprinted at 330 U.S. 63, 71.

II. THE ORDINANCES UNDER CHALLENGE ARE UNCONSTITUTIONAL BECAUSE THEY ARE SPECIFICALLY DIRECTED AT A RELIGIOUS PRACTICE AND ENTANGLE THE CITY IN THEOLOGICAL JUDGMENTS

As the district court acknowledged, the ordinances under challenge "are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah." Pet. App. 23. For this reason alone they are unconstitutional.

Ordinance 87-71 prohibits animal "sacrifice" in "a public or private ritual or ceremony not for the primary purpose of food consumption." As the language of the Ordinance shows, the killing of animals is not illegal in Hialeah: only the killing of animals in a "ritual or ceremony" is illegal. The ordinance is "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). Indeed, this ordinance cannot be distinguished from an example given by this Court in *Smith*:

It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons,

or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. at 877-878. The Hialeah ordinance may be contrasted with the Oregon anti-drug law upheld in *Smith*. The Oregon law applied to everyone, and this Court held that no exception was required for the Native American Church. Here, the Ordinance applies to no one *except* those involved in rituals and ceremonies. Religion is "singled out."³

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause.⁴ Indeed, even those scholars who have espoused a narrow interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority.⁵ Locke wrote: "Whatsoever is lawful in the commonwealth, cannot be

³ It is no answer to say that there may hypothetically be some nonreligious rituals or ceremonies to which the ordinance might apply. No such occasions have occurred in Hialeah, and it is undisputed that the ordinance was adopted in specific response to the petitioners' announcement of the opening of a church. Pet. App. 22-23.

⁴ See Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990).

⁵ E.g., Walter Berns, *The First Amendment and the Future of American Democracy* (1985); Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978).

prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses." Locke, "A Letter Concerning Toleration," 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952). Indeed, as if anticipating this very case, Locke specifically defended the right to animal sacrifice so long as animals were killed for food: "if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. . . . [W]hat may be spent on a feast may be spent on a sacrifice." *Id.* at 12-13. The ordinances here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause and the view of the founders that religious freedom is an inalienable right. See Declaration of Independence, 1 Stat. 1 (1776); Madison, *Memorial and Remonstrance*, ¶ 1, reprinted at 330 U.S. 1, 64.

Ordinance 87-52 is unconstitutional for the same reason. Paragraph 1 forbids any person to sacrifice or slaughter certain animals "intending to use such animals for food purposes." Paragraph 2 includes within the ban "any group or individual that kills, slaughters or sacrifices animals for any type of ritual," whether or not the flesh is consumed. Paragraph 3 exempts licensed slaughterhouses and other uses permitted under state and local law. When the fog clears, the only killing of animals this ordinance prohibits is that for religious purposes.

Ordinance 87-72 forbids the "slaughter" of animals except in licensed slaughterhouses or by individuals or groups who slaughter "small numbers of hogs and/or cattle." This ordinance is susceptible to more than one

interpretation. Many persons in Hialeah kill animals for various purposes, including for food, but are not deemed to fall within the strictures of the ordinance (apparently because the killing is not in large quantities or for commercial purposes). For example, hunters kill animals for domestic consumption or for the sport of it, and fishermen kill fish for the same reasons, but their actions are not deemed to fall within the ordinance. Like hunters and fishermen, petitioners kill animals and often eat them, but they do not do so in large quantities or for commercial purposes. Either the ordinance does not apply to petitioners' church, which does not slaughter animals commercially for food, or the ordinance has been applied on a discriminatory basis, in violation of *Smith*. See Pet. at 14.

Moreover, if petitioners are deemed to be engaged in the "slaughter" of animals during their rituals, and thus subject to Ordinance 87-72, they are protected under Florida state law, which specifically allows "ritual slaughter." Fla. Stat. Ann. § 828.22(3) (1985). The Florida Attorney General has opined that petitioners are not protected by this statute because they are engaged in "sacrifice" rather than "slaughter," and that the exemption for ritual slaughter applies only to "the killing of animals for food." Fla. Att'y Gen. Opin. 87-56, Annual Report 146, 149 (1987). The Florida authorities cannot have it both ways. Either petitioners' activity constitutes "slaughter" and is protected under state law, or it does not, in which case Ordinance 87-72 does not apply.

Ordinance 87-40 provides that anyone who "unnecessarily . . . kills any animal . . . in a cruel or inhumane manner, is guilty of a misdemeanor." This ordinance presents two constitutional problems.

First, the government has no legitimate authority, under the First Amendment to determine whether religious rituals are "necessary." Such a determination could mean only one of two things: either some religious rituals are "necessary" and some are not; or that religious activities in general are "unnecessary." Either way, the judgment is unconstitutional. To the members of the Church of the Lukumi Babalu Aye, the sacrifice of animals is as necessary as participation in the Passover Seder is to an observant Jew. The government has no authority to gainsay this theological judgment, or to favor one tradition of worship over another. But if religious activities – unlike secular activities such as food gathering or sport – are automatically deemed "unnecessary," this constitutes discrimination against religion of the very sort condemned in *Smith*. It treats religion as a mere whim, automatically subordinate to what the secular world considers "necessary."

In this respect, the ordinance is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. at 883. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to

extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. at 884. In this ordinance the City allows the killing of animals (even "in a cruel or inhumane manner") where the killing is "necessary." This requires an individuated determination of "necessity." Having set up such a system, the City may not categorically refuse to extend it to cases of religious necessity.

The second constitutional problem with Ordinance 87-40 is that its prohibition of "cruel or inhumane" methods of killing has been defined in a discriminatory fashion. As the evidence below showed, petitioners' method of animal sacrifice is quick in almost all cases. R 12-891 (testimony of Dr. Fox, National Vice-President of Humane Society of the U.S.). The district court, however, credited testimony that there is "no guarantee" that this will always be the case. Pet. App. 13. This requirement of an iron-clad "guarantee" of humaneness is imposed on no other form of animal killing. The City allows other forms of killing, including hunting and extermination, that are far more likely to cause pain and fear in animals in a far greater number of cases. Religion alone is subjected to this standard. The district court required the petitioners to prove that no serious risk of harm would result from their worship services. Pet. App. 13, 45-46, 46 n. 59, discussed in Petitioner's Brief at 35-36. The burden of demonstrating harm, however, falls on the government, not a religious claimant. The district court thus inverted the entire concept of who is supposed to be restrained by the Free Exercise Clause from doing what and to whom.

Accordingly, each of the ordinances under challenge is constitutionally flawed. One prohibits a religious practice on its face (Ord. 87-71). Two more do so by interpretation of their terms (Ord. 87-40 and 87-52). And the fourth does so by discriminatory application of commercial regulations to a noncommercial religious practice (Ord. 87-72). If the City wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the City might be forced to reconsider how powerful its interests are in this matter if it has to apply the same rules to hunting and other socially acceptable forms of killing that it applies to this unfamiliar and unpopular minority religion.

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

Once it is recognized that the Hialeah ordinances are neither neutral (in purpose or effect) nor generally applicable, it is evident that they can be upheld only if they are the least restrictive means of attaining a compelling governmental purpose. Under *Smith*, this most exacting standard of judicial review is reserved under the Free Exercise Clause for laws that single out religion for a discriminatory prohibition. Indeed, one of the reasons the Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not "water[ed] down" but rather "really means what it says." 494 U.S. at 888. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.* No ordinary governmental interest will do.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

In the two years since the *Smith* decision, the lower courts have gotten the message that the scope of application of the Free Exercise Clause has been constricted, but they have not shown any sign of understanding that, within this narrowed field, the degree of protection has been intensified. Rather, as this case exemplifies, the courts have engaged in a wholesale retreat from protection for Free Exercise rights. *Amici* therefore urge the Court to use the opportunity of this case to reaffirm the protective side of the *Smith* approach: that within the field of laws discriminating against religion, the very strictest of judicial scrutiny will apply.

The district court purported to find the City's interest in enforcing the ordinances against animal sacrifice "compelling," Pet. App. 43-45, but the haphazard and undemanding way in which it went about this analysis robbed the compelling interest test of its extraordinary force. The court cited and credited a number of plausible connections between petitioners' religious practices and legitimate governmental interests, such as public sanitation, humaneness toward animals, and zoning criteria. But *never* did the court explain, in all its analysis, why petitioners' practices pose *more* of a threat to these interests than other activities that take place daily and legally within the confines of Hialeah.

In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest. *Amici* doubt that the government *ever* could have a compelling interest in forbidding for religious purposes an activity it permits for other purposes. Certainly no such interest was demonstrated here. There are many secular activities that pose the same (or worse) threat to the government's interest than is posed by petitioners' religious services. Unless the City can justify singling out religion for peculiar burdens (and it has not even tried), the ordinances must be struck down.

IV. GOVERNMENT AGENCIES AND LOWER COURTS HAVE MISREAD *SMITH* TO CONDONE OFFICIAL HOSTILITY TO RELIGION

This is the first free exercise case to reach this Court since the decision in *Smith*. Petitioners have not asked this Court to reconsider *Smith*, and *amici* are confident that petitioners should prevail even under the constitutional doctrine announced in *Smith*. We nonetheless wish to inform the Court that religious and civil liberties communities, across the spectrum of theological and political opinion, are united in the conviction that *Smith* was wrongly decided,⁶ not only because it has had consequences that we believe were unintended and unanticipated, but also because it radically diminished the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his

⁶ The procedure in *Smith* was unusual; the question decided was neither presented nor briefed by either side.

own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety. The Free Exercise Clause, we believe, is more than just a specialized "equal protection clause" for the relatively unusual cases (like this one) in which the government actively discriminates against an unpopular minority religion, or religion in general.

An understanding of the debate engendered by the *Smith* decision is relevant to the Court's disposition of this case in three respects. First, the *Smith* opinion expressly left open several exceptions. The areas in which the previously articulated doctrine of compelling governmental interests remains in effect include: "hybrid" cases involving the Free Exercise Clause in conjunction with other constitutional protections, 494 U.S. at 881-82, cases involving internal church disputes regarding doctrine or authority, *id.* at 877, and cases involving "individualized governmental assessment of the reasons for the relevant conduct," *id.* at 884.⁷ In future litigation in this and the lower courts, these exceptions could either expand or contract, depending in part on this Court's perceptions of how *Smith* is actually working in government agencies and in the lower courts. If *Smith* in practice is rendering important freedoms vulnerable to government interference, the Court must be aware of that in determining the reach of *Smith* and the scope of its exceptions.

Second, the state and lower federal courts respond not merely to the precise legal doctrine reflected in the holdings of this Court, but also to their own perceptions

⁷ For a detailed analysis of these exceptions, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 41-54.

of the Court's purpose and direction. As we will explain below, the lower courts have interpreted *Smith* as requiring or inviting a radical withdrawal of constitutional protection for religious freedom, beyond anything this Court could likely have expected. This Court should be aware of that fact, so that it will be able to take corrective steps, beginning with this case.

Third, the history of this Court's doctrinal development shows that the coherence and durability of new constitutional doctrine is tested against the realities of subsequent cases in the field. Where the new doctrine receives responsible criticism and is seen to produce results at odds with our constitutional traditions and aspirations, the Court has demonstrated its willingness to reconsider its approaches. We hope that this case will initiate that process.

The circumstances of *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), are instructive. At the time of the second flag salute case, the Justices were aware of the campaign of repression directed against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), including the application of "generally applicable" taxes, licensing laws, and regulations of door-to-door solicitation to the Witnesses in order to drive them out of a state. All of this was accompanied by waves of violent attacks on the Witnesses both by the police and by vigilante mobs. See Peter Irons, *The Courage of Their Convictions* 22-23 (1988). In this setting the *Barnette* Court overruled *Gobitis*. In *Barnette* Justice Robert Jackson proclaimed a vision of freedom in these ringing terms: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to

place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* at 638. It would be a step backward if this Court were to abandon *Barnette* and return to the narrow confines of *Gobitis*. See *Smith*, 494 U.S. at 902 (O'Connor, J. concurring).

a. Free Exercise in the lower courts after Smith. An evident premise of the *Smith* decision was that the protection accorded by the previously articulated compelling interest test was exceptional and mostly unnecessary, because freedom of religion in this country is protected largely by traditions of toleration respected in the democratic process. But this case illustrates graphically that traditions of toleration give way all too easily to majoritarian passions when strange and unfamiliar religious practices are at issue. *Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). Neither the ancient roots of animal sacrifice nor its observance by millions of Muslims and of Santería adherents throughout the world today was very impressive to the government in Hialeah. Indeed, to witnesses supporting the ordinances the regulation was needed to bar "paganism" from Florida. R 8, at 81-82; Pl. Ex. 10, at 4. Asking the *santeros* to look to the Hialeah City Council for relief is like sending the Jehovah's Witnesses to the Minersville School Board. See John Noonan, *The Believer and the Powers that Are* 233-55 (1987); David Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (1962).

Lower court cases since *Smith* demonstrate that local governments often have little or no respect for sincere religious convictions at odds with the sensibilities or preferences of the majority, and that an antidiscrimination principle is not sufficient to shield the exercise of

religion from the intolerance of majorities and the inflexibility of bureaucrats. In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), for example, a religious hospital was compelled to teach all residents how to perform abortions. The district court concluded that this outrageous invasion of conscience was in service of a "compelling" governmental interest. What is most striking about the case is that state officials did not even consider a belief so deeply and widely held as conscientious objection to performing abortions, ignoring this Court's suggestion that the political branches should provide free exercise exemptions. In the face of this remarkable insensitivity, the court was powerless to supply a remedy.⁸

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order. The shelter was on the second floor of a walk-up. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its "neutral" rules requiring an elevator in homeless shelters. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under *Smith* analysis, the State did not need any reason; even a frivolous "generally applicable" rule was enough to shut down a religious mission. The bureaucracy won,

⁸ See *Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

and the nuns and the homeless lost. See Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, New York Times, Sept. 17, 1990, at B1, col 1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had protested the practice of slopping pork onto his plate so that he was unable to eat the remainder of the prison meal. The court indicated, however, that the intervening decision in *Smith* may have undercut the legal basis for the prisoner's claim: *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

In *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring autopsies was applied to the son of a Conservative Jew, for whom the defilement of the body is a sacrilege, and for whom burial must take place at least before sundown on the day after the death. Since the man had died in an auto accident, that should have satisfied whatever interest the government might have in ascertaining the cause of death of its citizens. See also *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990) ("regretfully" reversing on the basis of *Smith* its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies). In both cases, a mechanical approach to "generally applicable" norms was allowed to trump a sincerely held religious tenet, in a manner that was manifestly not the least restrictive alternative means of effectuating a governmental interest that was not very strong.

After becoming aware that they no longer have a constitutional obligation to accommodate minority religious convictions, governmental agencies have typically pursued the bureaucratic imperative without regard to contrary religious interests, belying the promise in *Smith* that the political branches of government can safely be trusted to respect the value of protecting the first of our civil liberties. Even a well intentioned legislature may frequently be unaware of the impact of its laws on unfamiliar faiths, and the press of business in the legislatures makes legislative remedies an uncertain source of protection.

At the local level, zoning laws have been invoked – as they were here – both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. See *Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, appeal denied, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990); R. Niebuhr, "Here Is The Church," *Wall Street J.*, Nov. 20, 1991, at A1, col. 4. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's spread of the gospel is the clearest example imaginable of governmental overreaching.

At the federal level, one agency even construed *Smith* to allow – or worse yet, to require – the revocation of a religious exemption from requirement of wearing hard hats on construction sites. OSHA Notice CPL 2 (Nov. 5, 1990). This administrative decision – temporarily lifted under congressional pressure – exemplifies the bureaucratic impulse to enforce all laws to the limit of their logic, without regard for their impact on religious minorities.

This bureaucratic tendency has even led officials in the Justice Department to extend the reach of *Smith* to "generally applicable" norms of oppressive foreign regimes. In its training manual dealing with asylum for refugees claiming a well-founded fear of persecution, the INS characterizes *Smith* as supporting an "[a]lien's obligation to obey general law, notwithstanding religious objection." Dep't of Justice, Immigration and Naturalization Service, *Basic Law Manual Asylum: A Training Manual for Immigration and Naturalization Officers* 37 (1991). The "tempest-tossed yearning to breathe free" may evidently be denied asylum if a government attorney couches their experience of religious persecution abroad in facially neutral terms. This Court surely did not have in mind complicated asylum claims when it decided *Smith*, but that case is now being invoked to assert the tautological, Statist claim that a foreign government may "seek to punish conduct it may lawfully forbid." *Id.*

Unless *Smith* is corrected, Roman Catholic children will no longer have a right of excusal from sex education classes in public schools contrary to their religious teaching; no longer will churches have a free exercise right of exemption from employment laws forbidding discrimination against homosexuals when they choose their minister or music director; no longer will doctors or nurses be able to assert a religious ground for declining to participate in compulsory training or participation in abortion procedures; no longer will the confidentiality of the confessional be constitutionally protected when prosecutors call the priest as a witness in court; no longer will Jewish prisoners be entitled to kosher meals; no longer will religious schools be able to invoke the Free Exercise Clause to shield themselves from accreditation standards

applicable to secular public schools; no longer can Jehovah's witnesses avoid jury service, can Christian Scientists avoid unwanted medical care, or Jewish college students avoid exams scheduled on high holidays.⁹ All these are relegated to their political remedies, despite the manifest tendency of the political process to favor the mainstream over the heterodox.

The problem with the "general applicability" standard is that general laws are enacted in accordance with the mores of the bulk of the population, frequently

⁹ None of these cases are hypothetical. All are real. See *Smith v. Ricci*, 89 N.J. 514, 446 A. 2d 502 (1982), *Medeiros v. Kiyosaki*, 478 P. 2d 314 (Hawaii 1970) (sex education); *Walker v. First Orthodox Presbyterian Church of San Francisco*, 22 FEP Cases 762 (Cal. Super. Ct. 1980) (church may decline to hire gay organist); *Cole Durham, Mary Anne Wood, and Spencer Condie, Accomodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 Brigham Young L. Rev. 253 (citing cases), but see *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990); *People v. Philips* (N.Y. Ct. of Gen. Sessions 1813), reprinted in *Privileged Communications to Clergymen*, 1 Cath. Lawyer 199 (1955) (confidentiality of confession); *Kahane v. Carlson*, 527 F. 2d 492 (2d Cir. 1975) (kosher meals for prisoners); *Kentucky State Bd. for Elementary & Secondary Ed. v. Rudasill*, 589 S.W. 2d 877 (Ky. 1979) (state constitutional protection of religious schools); "Presbyterian Seminary Faces Catch-22 on Accreditation," *Washington Post*, Apr. 20, 1991, at G 11; *In re Jenison*, 375 U.S. 14 (1963), on remand, 267 Minn. 136, 125 N.W.2d 588 (1963) (jury duty); *Walker v. Superior Court*, 47 Cal. 3d 112, 763 P. 2d 852 (1988) (prosecution of Christian Scientist for manslaughter for failure to provide medical care to child does not violate federal Free Exercise Clause); "Professor Criticized for Exam on Yom Kippur," *New York Times*, Oct. 14, 1989, § 1, at 26, and Steve Jacobson, "Edwards Needs Sensitivity," *Newsday*, Nov. 10, 1989, at 165 (professor at state university refused to reschedule exam or allow make-up exam for Jewish students).

without any consideration of their impact on minority religions. In light of the close connection between majoritarian mores and religious norms, the requirement that a law be "generally applicable" is not, and cannot be, a guarantee of neutrality. It is at most a guarantee that the laws will conform to the norms of mainstream belief.

Sometimes a facially neutral law does not even reflect majority norms. Legislation is often driven by interest group pressures, and narrow but determined interest groups may push through generally applicable legislation deeply hostile to religious needs. The most obvious contemporary examples of this phenomenon are the battles between the pro-choice and gay rights movements, on the one hand, and Roman Catholics, Orthodox Jews, and conservative Protestants on the other. See Richard Duncan, *Gay Rights: A Scud Attack on Religion*, *Legal Times*, Apr. 20, 1992, at 25.

In the face of deep and abiding differences over fundamentals, there is no coherent concept of religiously "neutral" laws; all laws necessarily reflect the religiously informed norms of the society. The only hope for a regime of religious freedom is a policy of pluralism, accommodation, and mutual forbearance. To be sure, the judiciary cannot police every conflict between majority will and minority faith. But if the courts articulate the constitutional standard so that legislatures and bureaucrats will understand that their power to interfere with religious life is constrained, courts need enforce the standard only occasionally. Constitutional litigation is the tip of the iceberg. The real power of this Court is to set the terms of engagement. The negative impact of *Smith* was not only on plaintiffs in court, but also on believers and

churches in negotiations with city hall. Religious communities suddenly lost their ability to rest their claims for decent consideration on any claim of right, and that has already made an enormous difference. The Court in *Smith* may have underestimated its own role in sustaining the traditions of tolerance that it relied on to protect religious minorities.

b. *The historical meaning of free exercise.* The *Smith* opinion did not refer to the historical record from the Framing period, which indicates that the concept of free exercise would likely have been understood to denote a substantive liberty rather than merely a nondiscrimination requirement.¹⁰ Like most other provisions of the Bill of Rights,¹¹ the Free Exercise Clause constitutionalized a practice that had previously been a matter of common or statutory law. During the colonial and pre-constitutional periods, conflicts had sometimes arisen between the sincerely held religious beliefs of some Americans and the generally applicable laws of the colonies and states, and in response, accommodations or exceptions were made. Examples include exemptions from oath requirements,

¹⁰ See Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); Douglas Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591 (1991); Dep't of Justice, Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 1-31 (1986).

¹¹ See *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting) (Fourth Amendment prohibition of unreasonable seizures was based on common law); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (interpreting Eighth Amendment excessive fines clause on the basis of the practices and understandings of the day).

mandatory tithes, certain aspects of family law, and – most significantly – military conscription. McConnell, *supra*, 103 Harv. L. Rev. at 1466-73.

The language of the pre-1789 state constitutions suggests that such exemptions had come to be understood as a matter of constitutional right. Twelve of the thirteen state constitutions contained provisions guaranteeing the free exercise of religion (or, as expressed in some, the “rights of conscience” or the freedom to worship), and eight of these did so in the form of a basic substantive guarantee coupled with a reservation of power in the state to override free exercise when necessary to protect the public peace and safety. This was the eighteenth century equivalent of the modern compelling interest test. Massachusetts, for example, provided that “no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace or obstruct others in their religious worship.” Mass. Const. of 1780, art. II, reprinted in B. Poore, ed., 1 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 956, 957 (1878). Article 61 of the Georgia State Constitution of 1777 provided: “All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.” *Id.* at 377, 383. For the other provisions, see McConnell, *supra*, 103 Harv. L. Rev. 1456-58.

The most plausible construction of these provisions is that they stated a substantive right of free exercise, limited by the power of the state to prevent injury to others. Certainly they contain no language that suggests that generally applicable laws interfering with the right to

worship would be legitimate. If free exercise guarantees were not read to exempt believers from "otherwise valid" laws, what was the purpose of the "peace and safety" provisos? This interpretation is confirmed by James Madison's comment that religious freedom would be protected "in every case where it does not trespass on private rights or the public peace." 9 *Writings of James Madison* 98, 100 (G. Hunt ed. 1901) (letter to Edward Livingston, July 10, 1822). Since the federal Free Exercise Clause was evidently modelled on the state precursors, and there is nothing in the legislative history of the federal provision that suggests a change in meaning,¹² the substantive interpretation of the Free Exercise Clause is the most persuasive.¹³

¹² See *Browning-Ferris, supra*, 492 U.S. at 264 (since "at least eight of the original States which ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions, . . . the matter was not a likely source of controversy or extensive discussion").

¹³ The history of adoption of the Fourteenth Amendment also demonstrates that the Framers of that Amendment, through which the First Amendment was applied to the states, understood the freedom of religion to be threatened by generally applicable laws. Their prime examples came from the black codes, which were not aimed specifically against religion, but had the effect of prohibiting its exercise. The principal draftsman of the Fourteenth Amendment, John Bingham, commented: "Before [the Fourteenth Amendment] a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or

(Continued on following page)

Moreover, changes since the founding have made it all the more vital to require the state to demonstrate a compelling reason if it is to override a sincere religious claim. Government at all levels is now far more intrusive than it was at the time of the founding. As one commentator has noted, "The style and scope of twentieth century government has led to its involvement with ends and values of varying importance." Donald Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1388 (1967). In the days of the watchman state, there was little need for religious exemption; in the days of the regulatory state, there is every need. To regulate religion on the same basis as other activities is to brook deep and constant intermeddling by the state in matters of religion.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15,

(Continued from previous page)

break with him his crust of bread. . . . Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example of Georgia and send men to the penitentiary, as did that State for teaching the Indian to read the lessons of the New Testament, to know that new evangel, 'The pure in heart shall see God.' " *Cong. Globe*, 42d Cong., 1st Sess. 84 (app.) (1871). See also *Cong. Globe*, 39th Cong., 1st Sess. 474 (1865) (statement of Lyman Trumbull discussing effect on the right to preach of laws forbidding teaching slaves to read); *Cong. Globe*, 38th Cong., 1st Sess. 1199 (1863) (statement of James Wilson criticizing slavery for its "incessant, unrelenting, aggressive warfare upon . . . the purity of religion").

1789). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the Framers could ever have anticipated 200 years ago.

The spirit of the recent celebration of the bicentennial of the Bill of Rights makes this an apt time for the Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did in Hialeah with such ill-disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." *The Williamsburg Charter*, reprinted at 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX A

Americans United for Separation of Church and State [Americans United] is a national non-profit organization committed to preserving religious liberty and the principle of separation of church and state. Americans United is composed of some 50,000 members of various religious beliefs and some of no religious affiliation residing throughout the United States. Although representing various religious and ethical perspectives, all Americans United members support the principles of religious freedom and equal treatment of all religious faiths before the law. Americans United members are currently involved in several religious liberty matters that will be directly affected by the ultimate decision in this case.

James E. Andrews, as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 3,000,000 members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. At the outset, the Stated Clerk is compelled to make six statements: (1) The Church entirely rejects and has never participated in the practice of religious animal sacrifice. (2) Cruelty to animals is a serious matter. Indeed, as early as 1875, the General Assembly condemned all acts of cruelty to animals as "utterly abhorrent to the spirit of the gospel. . . ." (Minutes p. 510). In 1990, the General Assembly again addressed animal cruelty. The problem of animal cruelty is not, however, made worse by the proper carrying out of a religious animal sacrifice which are the facts in this case. (3) Animal sacrifice is an ancient religious practice

predating even Christianity, Islam, and Judaism. (4) The beliefs held by the Petitioners are sincerely held and are protected by the First Amendment. (5) The 200th General Assembly (1988) stated: "Churches have a right of autonomy protected by the Free Exercise clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention. The government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside in specific instances and government permitted to interfere with internal church activities." *God Alone is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.) 16-17. (6) This case exemplifies the disturbing trend of courts to broadly misapply this Court's ruling in *Employment Division v. Smith* and, in so doing, to routinely and harshly burden the free exercise of religion guaranteed in the First Amendment. The Stated Clerk, therefore, urges this Court to address and rectify the broad misapplication of the *Smith* decision in this case and to provide correct guidance to other courts. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration by all the denomination's members.

The American Jewish Committee was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the

civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports a broad interpretation of the Free Exercise Clause of the First Amendment. One corollary of this principle is that only when justified by a compelling interest of society may the government bar a faith group from carrying out a practice dictated by its religious beliefs. It is our belief that government can never have a compelling interest in prohibiting for religious purposes an activity it permits for non-religious purposes. That is precisely the issue presented by the case at bar.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has litigated many cases arising under the Free Exercise Clause. Rituals play a large role in Judaism, and these rituals often run into conflict with the assumptions of the larger culture. Accordingly, it is important for the well being of Judaism that courts be able to scrutinize statutory enactments for both overt and subtle religious gerrymanders.

The Anti-Defamation League [ADL] of B'nai B'rith was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state and through the right to the free exercise of religion. In support of this principle, the

League has previously filed briefs as a friend of the court in numerous cases dealing with the religious liberty clauses of the First Amendment. The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. ADL also addresses this appeal because of deep concern that as a result of this Court's ruling in *Smith*, effectively discarding the thirty-year old "compelling state interest" test used to judge government restrictions on an individual's religious practice, the religious liberty of Americans is not adequately protected.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States and deals exclusively with issues pertaining to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Catholic League for Religious and Civil Rights [League] is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is

committed to ensuring the American people's continued enjoyment of the strong protections afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] is an unincorporated religious association with activities throughout much of the world. It has more than 4 million members and more than 9,000 congregations throughout the United States. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-day Saints.

The Evangelical Lutheran Church in America was formed in 1988 by merger of three predecessor Lutheran church bodies that had each adopted as a policy statement, "The Nature of the Church and Its Relationship with Government," that declares opposition to "any attempt by government to curb religious liberty through criminal and/or administrative measures focused at groups, except in cases posing a grave and immediate threat to the public's health, safety, or welfare."

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins the accompanying brief because it believes and has long taught that freedom of conscience must include not only the right to believe but also the right to express, advocate and bear witness to belief and that governmental neutrality towards religion is in the best interest of both religion and government, and of society at large. The Church also joins this brief to express its great concern and dismay over the serious erosion of religious freedom resulting from lower courts'

applications of *Smith*, and to urge the Court to restate that the protection given religiously motivated conduct must equal that extended to other activities by the Bill of Rights.

Home School Legal Defense Association [HSLDA] is a non-profit association dedicated to preserving the fundamental right of parents to remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. Formed in 1983, HSLDA provides legal defense for its 23,000 member-families nationwide that are schooling their children at home. Frequently, HSLDA defends these home school families by asserting their constitutional rights to free exercise of religion.

Mennonite Central Committee U.S. is the relief, service, development and advocacy agency of the Beachy Amish Mennonite, Brethren in Christ, Conservative Mennonite Conference, Evangelical Mennonite Church, General Conference Mennonite Church, Mennonite Church and Mennonite Brethren Church representing some 188,000 members in the U.S.

The National Association of Evangelicals [NAE] is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

People For the American Way [People For] is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights. People For has been extremely concerned about the dangers to religious liberty posed by this Court's 1990 decision in *Smith*. People For seeks to participate as an *amicus* in this case because, even though the specific religious practices at issue are contrary to the religious or moral convictions of many members of People For, a decision by this Court affirming the rulings below would further threaten the religious freedom of all Americans.

(12)
No. 91-948

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF-THE LUKUMI BABALU AYE, INC.,
and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF OF PEOPLE FOR THE ETHICAL TREAT-
MENT OF ANIMALS, NEW JERSEY ANIMAL
RIGHTS ALLIANCE, AND THE FOUNDATION FOR
ANIMAL RIGHTS ADVOCACY AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of several organizations concerned with the protection and humane treatment of animals, which have a particular interest in the issue of ritual sacrifice.

People for the Ethical Treatment of Animals ("PETA"), located in Maryland, is a non-profit organization with a membership of approximately 350,000 persons. For the last ten years, PETA has been at the forefront of the animal protection movement and has promoted the humane treatment of animals throughout the United States through nationwide educational programs, sponsorship and support of federal and state legislation, and widely-publicized media campaigns to expose and prevent the abuse of animals. PETA has a keen interest in the treatment of farm animals, and has investigated numerous reports of abuse of animals in ritual sacrifice.

The New Jersey Animal Rights Alliance ("NJARA") is a non-profit organization with approximately 1,200 members that promotes the welfare of animals in the State of New Jersey. It has been active in education, investigation of animal abuse, and sponsorship of state legislation to protect animals. NJARA members have been informed of and have investigated many incidents of ritual sacrifice, especially in the Northern New Jersey urban areas, where the discarded bodies of sacrificed animals are frequently found in open areas, especially near the waterfronts. NJARA members are active in campaigns to prevent the cruel treatment of animals in such rituals.

The Foundation for Animal Rights Advocacy is a non-profit organization that seeks to ensure the legal protection of animals. Members of the Board of Directors of the Foundation have been involved in the investigation of Santeria ritual sacrifice in New York, the District of Columbia, and Florida.

Written consent of the parties for the filing of this brief has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The question before this Court is whether a municipality may, consistent with the first amendment to the United States Constitution and the holding of this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), pass and enforce ordinances to prevent the unregulated killing of tens of thousands of chickens, ducks, goats and other animals within its community and ensure that animals are safely and cleanly held, humanely killed and disposed of in a way that will not endanger the health and well being of its citizens. Petitioners, members of a religious group that engages in frequent ritual sacrifice as part of its religious practices, claim that their religion is thus impermissibly burdened by the ordinances.

Amici disagree that the ordinances in question in any way violate the first amendment and this Court's holding in *Smith*. Petitioners essentially argue that the first amendment should be interpreted to afford what *Smith* specifically rejected, "a private right to ignore generally applicable laws." *Id.* at 886. Respondents are in the unusual position of being able to look to this Court's statement in *Smith* itself, in which the Court explicitly placed its imprimatur on Hialeah's regulation of animal sacrifice. The Court cited the opinion of the district court in this very case, which was affirmed by the Court of Appeals for the Eleventh Circuit, when it observed:

[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—[such as] animal cruelty laws, see *e.g. Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F. Supp. 1467 (SD Fla. 1989) . . . The First Amendment's protection of religious liberty does not require this.

Smith, 494 U.S. at 888-89. Amici agree.

ARGUMENT

I.

THE ORDINANCES IN QUESTION ARE NEUTRAL RULES OF GENERAL APPLICABILITY

A. The Ordinances Are Facially Neutral

"Activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). In *Smith*, 494 U.S. at 878-79, this Court noted that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." The Court held that the first amendment does not bar application of a "neutral, generally applicable regulatory law" *id.* at 880, to conduct that is motivated by religion, for to hold otherwise would find "a private right to ignore generally applicable laws" *id.* at 886.

Petitioners argue that the Hialeah ordinances are not generally applicable and that two of the ordinances (87-52 and 87-71) facially discriminate against Santeria and other similar religions that kill various living animals as part of their rituals. Petitioners assert that ordinances 87-52 and 87-51 are invalid because they single out and prohibit animal sacrifice, which is defined as the "unnecessary killing of an animal in a ritual or ceremony not for the primary purpose of food consumption." Petitioners claim that "ritual" and "ceremony" are terms that are so laden with religious connotations that the use of these terms in the ordinances indicates that the ordinances were passed to target only religious practice and that no secular killings of animals would be prohibited by the challenged ordinances.

Petitioners thereby ignore that finding of the district court that "[t]he use of the phrase 'ritual or ceremony' in ordinances 87-52 and 87-71, does not impermissibly target religious conduct." 723 F. Supp. 1467, 1484 (S.D. Fla. 1989). The lower court opinion noted that the terms "ritual" or

"ceremony" reaches "not just demonstrably bona fide religious conduct, but also includes the killing of animals by groups that would probably not enjoy First Amendment protection, such as satanic cults." *Id.* The district court relied on *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd*, 419 U.S. 806 (1974), which held that the use of the word "ritual" in the federal Humane Slaughter Act is not synonymous with "religious." The ordinances would, for instance, prohibit ritual sacrifice of animals in Voodoo or satanic ceremonies, from which Petitioners have taken pains to distance themselves in their Brief before the Court of Appeals for the Eleventh Circuit, noting that:

Santeria has nothing to do with the Satanism that this court encountered in *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989). Nor should Santeria be confused with Voodoo, a Haitian phenomenon so changed from its roots that "it is not, strictly speaking, an African religion any longer." R. Bastide [*African Civilizations in the New World*] at 138.

Brief of Appellants at 9. It would also prohibit behavior from the ritual sacrifice of animals by fraternities to the tearing off of chickens' heads by heavy metal rock bands. Because the ordinances prohibit ritual sacrifice whether performed for religious or secular reasons, the ordinances are facially neutral.

B. The Ordinances Were Not Motivated by Animosity or Discriminatory Intent Towards Petitioners' Religion

Petitioners allege that the ordinances are unconstitutional (Pet. Br. at 11). They claim that

[The] ordinances overtly discriminate against religion. All of them were enacted for the sole purpose of suppressing a religious practice, and that is almost their only effect. All of them recognize good and bad reasons for killing animals, and classify religious reasons as bad. They are not in any sense religiously neutral or generally applicable.

The district court, however, made a specific finding of fact that:

All the evidence established . . . that the council members' intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals, including religious sacrifice, the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by.

723 F. Supp. at 1479. The district court made specific factual findings, affirmed by the Eleventh Circuit, that the ordinances were prompted by the City's concern to protect important interests within its police power. The district court found that the ordinances were enacted to protect important municipal interests in three areas of traditional government concern—the protection of public health, protection of the welfare of children, and prevention of cruelty to animals.

The fact that concern for these interests was heightened when the church announced its plans to open a church in the city wherein ritual sacrifice would be performed within their community does not mean that the prohibition against ritual sacrifice and slaughter evidenced discriminatory intent or effect. The City of Hialeah has no areas that are zoned for slaughterhouses. 723 F. Supp. at 1481 n.46. However, the local Santeria adherents sacrifice an enormous number of animals each year. Based on the testimony of Petitioner Ernesto Pichardo, the district court calculated "that between 12,000 and 18,000 animals are sacrificed in initiation rites alone, during a one year period" in private homes in Dade County. *Id.* at 1473 n.22. The district court found that

the City of Hialeah acted properly in enacting zoning regulations that clarified that ritual sacrifice was not a protected practice under the ritual slaughter exception to the Humane Slaughter Act, and that all slaughters could only be performed in areas zoned for that use.

723 F.2d at 1481.

The district court made extensive findings of fact, which were not disturbed by the Court of Appeals for the Eleventh Circuit. In urging the Court to review the question of the motivation behind the passage of the ordinances, Petitioners ignore this Court's statement in *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 288-90 (1982), that "issues of intent [are] factual matters for the trier of fact" and therefore

[d]iscriminatory intent here means actual motive: it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a).

Justice O'Connor, concurring in *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985), in the area of establishment of religion, stated that "[i]t is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute." Petitioners insist that the ordinances were a thinly disguised attack on their particular religious practice, clothed in concern for otherwise legitimate public safety and health concerns. Amici would agree, however, that "courts are capable of distinguishing a sham secular purpose from a sincere one." *Id.* The trial court's finding regarding the motivation behind the passage of the ordinances was not clearly erroneous and should not be reviewed by this Court.

Petitioners argue that under *Smith*, "[i]f the City recognizes that there are acceptable reasons for killing animals, then it must classify religion among those acceptable reasons. This is the lesson of *Smith* and the unemployment cases as reinterpreted in *Smith*, 494 U.S. at 877-78, 884." (Pet. Br. at 13-14). Petitioners completely misinterpret the passages from *Smith* to which they look for support. Indeed, a state would impermissibly prohibit the free exercise of religion "if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the reli-

gious belief that they display." *Smith*, 494 U.S. at 877. This Court observed that the respondents in *Smith*,

seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).

Smith, 494 U.S. at 878.

The absurdity of Petitioners' argument—that if the state allows animal killings for non-religious reasons in certain circumstances, it must demonstrate a compelling interest when the killing is for religious reasons—is demonstrated by consideration of *Smith* itself. The drug control law at issue in *Smith* was not applicable to people ingesting Schedule I drugs which were prescribed by a medical practitioner. If Petitioners' argument were correct, the Court would have been forced to hold that since Oregon recognizes legitimate reasons to engage in the conduct of taking Schedule I drugs (following the advice of a medical practitioner), then the state must allow religious reasons to be among the accepted reasons and the regulation could *not* be applied to the use of peyote by Native Americans for religious purposes without a compelling interest. This was rejected by this Court, because

if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . .

. . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise

valid law prohibiting conduct that the State is free to regulate.

Id. at 878-79.

The district court expressly found that the challenged ordinances "were not passed to interfere with religious beliefs," but rather were enacted to "stop the practice of animal sacrifice in the City . . . whatever individual, religion or cult it was practiced by." 723 F. Supp. at 1479. The district court found that to the extent that Petitioners' religious conduct was affected by the ordinances, "that is incidental to the ordinances' secular purpose and effect." 723 F. Supp. at 1484. Because a generally applicable and otherwise valid ordinance prohibiting the sacrifice of animals has an incidental effect on Petitioners' religious rituals, does not mean that the decision below, which upheld the constitutionality of those ordinances, is in any way in conflict with *Smith*.

This Court should affirm the decision of the Court of Appeals for the Eleventh Circuit, which in turn affirmed the decision of the district court, that the Hialeah ordinances were neutral rules of general applicability that did not discriminate against religion.

II.

EVEN IF, CONTRARY TO FACT, THE ORDINANCES DISCRIMINATED AGAINST RELIGION, THEY WOULD BE SUPPORTED BY A COMPELLING STATE INTEREST

The district court found that "[t]he ordinances at issue were passed by the City because of the perceived need to prevent cruelty to animals, to safeguard the health, welfare and safety of the community, and to prevent possible adverse psychological effects on children exposed to such sacrifices." 723 F. Supp. at 1485.

Even if this case were to be analyzed under the standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), to examine the restrictive effect of the ordinances on Petitioners' religious

practice, the city's enforcement of the ordinances should be upheld as constitutional. The district court found a compelling state interest that could not be achieved by less restrictive means. Indeed, Justice O'Connor, concurring in *Smith* but arguing for the application of the *Sherbert* compelling state interest test in that case, described Justice Scalia's citing of the district court opinion *in this very case* as an example of the fact that "courts have been quite able to apply our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902. (O'Connor, J., concurring). Respondent thus presents to this Court its own explicit endorsement of the regulation of ritual sacrifice by these ordinances under both the *Sherbert* compelling state interest test and the relaxed *Smith* standard.

While *Sherbert* created the compelling state interest test to justify *some* government restrictions on religious practice, the *Sherbert* Court explicitly upheld those cases in which this Court permitted state regulation of conduct that posed some "substantial threat to public safety, peace or order." 374 U.S. at 403. The cases that the Supreme Court upheld in *Sherbert* did not talk in terms of compelling state interest. In *Sherbert*, this Court merely held that when the state sought to regulate conduct *not* generally "of a kind within the reach of state legislation," *id.*, then the state must demonstrate a compelling state interest. Clearly, the ordinances here directly address public safety, and even applying pre-*Smith* precedent would require no compelling state interest.

Even if, contrary to fact, Petitioners could characterize this case in such a way as to require the state to show a compelling state interest, the City can easily satisfy such a standard in this case. If, contrary to fact, the ordinances in question discriminated against religion, they should be upheld as a valid exercise of the state's police power serving compelling state interests.

The decision of the district court was made under a very strict standard. The district court rendered its decision prior to this Court's decision in *Smith*, under the analysis of the

stricter framework of *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984), which followed this Court's balancing test of *Sherbert v. Verner*, 374 U.S. 398 (1963). The district court interpreted *Grosz* to require that

[b]efore the Court balances competing governmental and religious interests, the government's action faces two threshold tests: the law must regulate conduct rather than belief, and it must have both a secular purpose and effect. . . . The government in the case at hand has met both tests.

723 F. Supp. at 1483.

The extensive findings of the district court would amply meet the compelling state interest test if, contrary to fact, such a test were required in this case. The City's interest in controlling the spread of disease is a clear exercise of its police power. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944). The City has a compelling interest in prohibiting the slaughter or sacrifice of animals within areas of the city not zoned for slaughterhouses. See *In re Slaughter-House Cases*, 83 U.S. 36 (18 Wall. 1872). The protection of animals from the cruelty of animal sacrifice is also of central concern to the City. See *Humane Society of Rochester v. Lying*, 633 F. Supp. 480 (W.D.N.Y. 1986); *Animal Legal Defense Fund v. Provimi Veal Corp.*, 626 F. Supp. 278 (D. Mass. 1986), *aff'd*, 802 F.2d 440 (1st Cir. 1986). Of course, there is a particularly strong interest in securing the welfare of children. See *New York v. Ferber*, 458 U.S. 747 (1982); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The opinion of the district court was rendered after an analysis of the ordinances under the stricter standard which the petitioners erroneously argue is required in this case, and the judgment below should be affirmed.

The district court made extensive factual findings on these three concerns. Amici seek to emphasize to the Court that these factual findings were not clearly erroneous and indeed, were supported by the testimony and affidavits of experts

who have dealt with the extreme cruelty inflicted on animals awaiting and suffering ritual sacrifice; with the problems of health associated with the disposal of the carcasses of sacrificed animals; with the trauma experienced by communities who are exposed to ritual slaughter in urban areas and may be confronted with the bodies of the slaughtered animals; and with the problems of any attempt to regulate rituals which occur in the inner sanctums of places designated for Santeria worship within city dwellings that are frequently part of multi-family dwelling units.

The City's concern about cruelty to animals is not trivialized by Petitioner's attempts to denigrate the efforts of the community to ensure the humane treatment of animals by discussing other instances in which the killing of animals is permitted, whether for food, or for pest or population control. The Florida Supreme Court noted that "it is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antorini*, 210 So.2d 443, 444 (Fla. 1968).

Petitioners seriously mischaracterize the nature of the evidence presented to the district court which led it to conclude that Santeria sacrifice was inhumane. Petitioners assert that "The animals are sacrificed by cutting the carotid arteries with a single knife stroke. Pet. App. A12. Cutting the carotid arteries is approved as humane by both Florida and federal statutes on religious slaughter." (Pet. Br. at 38).

The federal Humane Slaughter Act accepts two methods of slaughter as humane. It states:

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the two following methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered

insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

7 U.S.C. § 1902 (1988). The Florida statute, Fla. Stat. Ann. § 828(7)(b) (Br. App. A7) has similar provisions.

The district court gave considerable explanation of the Santeria method of sacrifice in its findings of fact and summarized the testimony of Petitioner Pichardo, a high priest of the church, concerning the method of sacrifice, which is effected by puncturing the neck of the animal by a single stab with a four-inch knife.

The knife is inserted into the right-hand side of the animal's neck and is pushed all the way through the animal's neck. The knife does not actually cut the throat of the animal, but instead goes directly into the vein area, just behind the throat, and in front of the vertebrae.

723 F.2d at 1472. This is not similar to the Jewish or Muslim methods of administering a single knife stroke to cut the animal's neck and carotid arteries which satisfies the conditions for exemption from the Humane Slaughter Act requirement of stunning before killing. Although the district court noted that Pichardo testified that this "hopefully would sever both of the main arteries" the district court was convinced by the expert testimony that,

this method of killing is not humane because there is no guarantee that a person performing a sacrifice in the manner described can cut through both carotid arteries at the same time. Additionally, some of the lining of the

artery can recoil and close the artery to prevent the instant hemorrhaging, in a tourniquet effect. [T]his Court finds, that the method used by the priest is not a reliable or painless method of severing both carotid arteries. . . .

. . . Only a complete neck severance can make it clear that the arteries have all been severed and a stabbing or poking is not acceptable either from a traditional standpoint or a humane standpoint.

Id. at 1472-73.

Congress was able to determine that the exemption for slaughter according to the Jewish tradition or similar traditions met standards of humane treatment, because a great deal of information was gathered concerning such practices. The Hearings on the Humane Slaughter Act considered testimonials of physiologists and other members of the scientific community on the issue of the humaneness of the Jewish method of slaughter. See *Humane Slaughtering of Livestock*, Hearings Before a Subcommittee of the Senate Committee on Agriculture and Forestry on S.1636, 84th Cong., 2d Sess. (1956). Senator Hubert H. Humphrey, chair of the Subcommittee, stated on the floor of the Senate during the debate on the Bill that

because the subject matter of kosher slaughter came before the committee, we asked for scientific information relating to the matter. A substantial body of evidence was presented . . . Not only is such a procedure accepted as a humane method of slaughter, but it is also so established by scientific research.

104 CONG. REC. 15391 (1958). In *Jones v. Butz*, 374 F. Supp. 1284, 1291 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974) in which the exemption for ritual slaughter in the federal Humane Slaughter Act was upheld in the face of a challenge concerning the establishment of religion, the court noted found "a persuasive showing that Jewish ritual slaughter, as a fundamental aspect of Jewish religious practice, was histor-

ically related to considerations of humaneness in times when such concerns were practically non-existent."

Moreover, the slaughter of animals according to a religious method that is humane under the Humane Slaughter Act is still heavily regulated. Virtually all such slaughter is subject to the provisions of the Meat Inspection Act. 21 U.S.C. §§ 601-645 (1967). Ritual slaughter that is exempted under the federal Humane Slaughter Act is regulable and regulated. Santeria sacrifice, as described by the Petitioners in the instant case, is a secretive act, performed away from the congregation, who are not initiated into its practices.

The district court reported that Dr. Perez, a sociologist, testified that "the outcome of this case would not necessarily affect the degree to which Santeria was practiced in private," 723 F. Supp. at 1470, because, as Dr. Perez testified, "[t]here may be a lot of Santeros who do not wish to place their belief on a public sort of marketplace." *Id.* at 1470 n.8.

This is confirmed by the writings of Santeria practitioners. Migene Gonzalez-Wippler, who has written extensively on Santeria practices and stresses the positive power of Santeria rituals, notes that the initiation ceremony, in which a large number of animals are sacrificed, takes place in a hidden sanctuary, away from the rest of the congregation who are not initiates. At such a ceremony, a variety of animals are killed. "While the standard practice is to sacrifice sheep, goats, hens, roosters, and pigeons to all the saints, the female orisha like Yemaya would also require ducks among the offerings. Chango, on the other hand, would want turtles, and the warrior gods . . . would need no less than three possums." M. Gonzalez-Wippler, *Santeria: African Magic in Latin America* 35-36 (1987). She notes:

The asiento [initiation ceremony] can be attended only by the initiate, his sponsor, the babalawo, whose duty it is to sacrifice the animals, and other santeros. Only those who have already "made the saint" can be present at the ceremony. . . . The madrina [sponsor] then tears off the head of a chicken and offers its warm blood to

the yaguo [the initiate] who drinks it thirstily. When the initiate awakens from his trance he sits on a throne that is erected for him . . . He sits there majestically surveying the ritual sacrifices of all the animals, and drinks a little of the blood of all the decapitated heads as they are offered to him by the yubbona [sponsor].

Id. at 36-37.

The district court reported that

Pichardo could give this Court no assurance that those who follow, in his eyes, a deviant form of Sante-ria, would conform to any regulation at all. Additionally, the religion has always been a secret religion and much is still not known. It is inconceivable that the religious practitioners would accept the type of regulatory controls on their activities that such conformity would require, especially in light of the fact that their sacrifice, by the terms of their religion, must be kept secret and cannot be monitored. A less restrictive ordinance simply could not be enforced.

723 F. Supp. at 1487 n.59. There is, therefore, no less restrictive means than the complete prohibition of such ritual sacrifice that could effectively regulate it to meet the City's legitimate concerns for human and animal welfare.

The disposal of the bodies of sacrificed animals is also unregulable by the city. Although Petitioners characterize the process as no more problematic than the disposal of restaurant or household scraps of meat, they do not mention the numerous ritual requirements for disposal of bodies which would not be satisfied if the bodies were picked up in plastic bags on the usual sanitation worker's route. The disposal of animal carcasses in urban areas would be part of the church's rituals, for example, in the ceremony where a representation of the head of the god Elegua is made from sandstone or concrete and, once properly dedicated, is used for divination, luck and protection.

Once finished, the head is buried on a crossroads before sunrise so that Elegua's spirit, which owns all crossroads, will enter the image and fill it with all his powers. Seven days later, the babalawo or santero who prepared the image will dig it out of the ground. The hole in which the image was buried is consecrated with the blood of three roosters, and then filled with the bodies of the sacrificed animals, toasted corn, bananas, candies and a generous shot of rum. It is finally covered with earth. . . .

M. Gonzalez-Wippler, *The Santeria Experience* at 160-61. The important elements of secrecy that surround the ritual sacrifices and the persons who perform them support the City's position that there was no less restrictive means than complete prohibition of such sacrifices to effect their valid concerns about public health, safety and welfare.

The church wishes to engage in sacrifice. It is not engaged in slaughter because its activity is not primarily "the killing of animals for food" as defined in Ord. 87-72. The primary purpose behind the ritual sacrifice of animals in Santeria is the sacrifice and offering of a life to the gods. It is far removed from the rituals of the Jewish or Muslim faith that are designed to ensure that the animal receives a "humane death" when it is killed primarily for food. Gonzalez-Wippler emphasizes this aspect of sacrifice, rather than ritual slaughter, when she describes the first time she witnessed a sacrifice:

This was the first time I saw an animal sacrifice, and my knees and my teeth knocked together all through the ceremony. In an animal sacrifice there is something primeval, something deeply connected with the collective unconscious of the race. It is all so simple. A quick twist of the hand, and the chicken's head is gone, and a thick stream of dark-red, hot blood is steaming from the severed neck. But it is not the beheading of the animal that is so earth-shaking. It is the giving of the blood, the

acceptance that blood is the life, the spirit; and that it is being returned to the divine source from where it came.

M. Gonzalez-Wippler, *The Santeria Experience* 47 (1982).

Moreover, if the church was engaged in slaughter, the district court found that the method of killing could not be considered humane and thus entitled to the exemptions provided for humane ritual slaughter under Florida and federal statutes protecting ritual slaughter. The church's activities *are* subject to the state anti-cruelty statute, however. If the members of the church took an animal and stabbed it to death in their homes in the method described by petitioner Pichardo, outside the context of a religious ceremony, they would be subject to prosecution for cruelty to animals. Petitioners are incorrect to characterize religion as one of the only reasons considered "bad" for killing animals. Petitioners seek exemption from the application of a neutral, generally applicable ordinance because their behavior which violates that ordinance is religiously motivated. It has long been established that "the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (footnote omitted).

The City showed that the ordinances in question were passed to protect interests of paramount importance to the City. These interests satisfy any argued necessity of demonstrating a compelling state interest to withstand a challenge to these ordinances on the grounds that they impermissibly restrict the free exercise of religion.

CONCLUSION

Amici do not suggest that the problems of restriction on religious practice that conflicts with valid, neutral state regulations should be resolved lightly in favor of uniform state regulation goals. The essence of religious freedom, especially in an increasingly multicultural society, is toleration of practices that differ considerably from the common experience of the majority and which seem strange and exotic to non-initiates.

It is clear, however, that the states must have the right to safeguard important secular goals of safeguarding the health and welfare of their citizens, without permitting exceptions to uniform enforcement of public health and safety laws for those whose religious practices conflict with generally applicable regulations. Moreover, the states must be free to ensure that animals are not subjected to cruel treatment.

Amici are very familiar with the ritual sacrifices that the Santeria church wishes to perform within Hialeah, and recognize that such practices pose real threats to the public health concerns that the City wishes to promote. Amici wish to stress that the factual findings of the district court, far from being clearly erroneous, which is the only ground upon which this Court should consider disturbing those findings, identify important state concerns that are being confronted by municipalities across the country who are becoming more aware of the practices of ritual sacrifice.

It must remain within the police power of the state to prohibit practices, performed for secular or religious purposes, that cannot be regulated in such a way as to ensure that paramount public health and safety concerns are not threatened. Amici strongly exhort this Court to uphold the constitutionality of the enactment and enforcement of the Hialeah prohibition of ritual sacrifice of animals.

Respectfully submitted,

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IN THE

DEPARTMENT OF THE UNITED STATES

OF THE DISTRICT OF COLUMBIA

GEORGE S. LUKASZAK & SONS, INC.
vs. FRANCIS J. HANCOCK

Plaintiff,

CITY OF WASHINGTON

Respondent.

Case No. 10,000 in the
District Court of the District of Columbia
at Washington, D.C.

Subscribed and sworn to before me this 17th day of July, 1932, at Washington, D.C.

Notary Public

Witness my hand and seal this 17th day of July, 1932, at Washington, D.C.

QUESTIONS PRESENTED

I. May Petitioners demand an exemption from neutral and generally applicable laws that prohibit the cruel or unnecessary killing of animals, an offense under both state and municipal law which is defined to include ritual animal sacrifice?

II. Does Respondent have compelling interests in the protection of animals from cruel or unnecessary killing, the protection of audiences (including children) from the spectacle of cruelty to animals, and the protection of the public from health hazards associated with the unregulated killing and disposal of sacrificed animals?

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<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	24

<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978)	21
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	27
<i>Mintz v. Baldwin</i> , 289 U.S. 346 (1933)	24
<i>Mormon Church v. United States</i> , 136 U.S. 1 (1890)	20
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	22
<i>Niemotko v. Maryland</i> , 340 U.S. 268 (1951)	10
<i>Peck v. Dunn</i> , 574 P.2d 367 (Utah), <i>cert. denied</i> , 436 U.S. 927 (1978)	21
<i>Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises</i> , 237 A.2d 342 (Pa. 1968)	14
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	25
<i>People v. Bunt</i> , 462 N.Y.S.2d 142 (N.Y. Just. Ct. 1983)	8, 13
<i>Perry v. Larson</i> , 104 F.2d 728 (5th Cir. 1939)	8

<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	23, 24
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<i>State v. Kaneakua</i> , 597 P.2d 590 (Haw. 1979)	11
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<i>State v. Office of Comptroller</i> , 416 So. 2d 820 (Fla. App. 1982)	8
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<i>Tuck v. United States</i> , 467 A.2d 727 (D.C. 1983), <i>aff'd</i> , 477 A.2d 1115 (1984)	9
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Statutes and Ordinances:

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7 U.S.C. § 2131 <i>et seq</i>	18
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16 Stat. 158, ch. 135, § 1	2
Mann Act, 36 Stat. 825 (1910) (current version at 18 U.S.C. § 2421)	9
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Miscellaneous :

H.R. Rep. No. 1336, 95th Cong., 2d Sess. 3 (July 10, 1978)	19
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Felthous & Kellert, <i>Violence Against Animals and People: Is Aggression Against Living Creatures Generalized?</i> , 14 BULL. AM. ACAD. PSYCHIATRY LAW 55 (1986)	22
Whitson, <i>American Pluralism</i> , Thought 492 (1962) .	12
Wash. Post, April 15, 1991, at A9	2
Wash. Times, December 2, 1987, at B2	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-948

CHURCH OF THE LUKUMI BABALU AYE, INC.,
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF FOR THE WASHINGTON
HUMANE SOCIETY AS *AMICUS CURIAE*
IN SUPPORT OF THE RESPONDENT**

INTEREST OF *AMICUS CURIAE*^{1/}

The Washington Humane Society is both a national organization and a local enforcement agency dedicated to the prevention of cruelty to animals. The Society was chartered by the 41st Congress of the United States in 1870, and it is the only such chartered animal welfare organization. 16 Stat. 158, ch. 135, § 1. Working with the United States Attorney for the District of Columbia, the Society enforces the District of Columbia's anti-cruelty laws. These laws include general prohibitions that have been applied to persons engaging in purportedly religious conduct that inflicts cruelty to animals, conduct like that of petitioners in this case.^{2/} The Washington Humane Society therefore has a direct interest in the outcome of this litigation, in addition to its more general concern to prevent unnecessary cruelty to animals.

^{1/} This brief is filed with the permission of the parties. Consents have been filed with the Clerk of this Court.

^{2/} The ritual sacrifice of animals is not an isolated problem confined to southern Florida. Pursuant to its authority to enforce the District of Columbia's animal cruelty laws, D.C. CODE ANN. §§ 32-901 - 32-911 (1981), the Washington Humane Society has taken legal actions against Santeria practitioners in the past. In 1987, after meetings with representatives of the Attorney General's office, the D.C. Department of Consumer and Regulatory Affairs, and the Washington Humane Society, a Santeria priest signed an agreement not to sacrifice animals during any ceremonies. See Wash. Times, December 2, 1987, at B2. See also Wash. Post, April 15, 1991, at A9 (describing fourteen roosters confiscated from a Santeria practitioner).

STATEMENT OF THE CASE

This litigation arises out of a series of ordinances enacted by the City of Hialeah during the summer of 1987. Responding to concerns about public health and animal welfare, a hearing was held by the City Council on June 9, 1987. The Council unanimously incorporated by reference the State of Florida's animal cruelty law, FLA. STAT. Ch. 828, as City Ordinance No. 87-40. That State statute provides in part:

Whoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, is guilty of a misdemeanor of the first degree

FLA. STAT. § 828.12 (emphasis supplied).

In September 1987, the City adopted three other ordinances to refine and clarify the operation of Ordinance No. 87-40. On September 8, 1987, the City adopted Ordinance No. 87-52, a law which prohibits the possession of animals intended for sacrifice or slaughter. On September 22, 1987, the City adopted two more ordinances, No. 87-71 (prohibiting the sacrifice of animals) and No. 87-72 (prohibiting the slaughter of any animals in premises not properly zoned for that purpose).

All four City ordinances were adopted after the Church of the Lukumi Babalu Aye, Inc., opened a Santeria

church in the City. Animal sacrifices are conducted during ceremonies attended by Santeria adherents, including children of all ages. On September 25, 1987, three days after the last two ordinances were adopted and before any enforcement action was threatened or even suggested, the Church and Ernesto Pichardo, one of its priests, (hereinafter collectively referred to as "the Santerias") brought an action in the United States District Court for the Southern District of Florida seeking a declaratory judgment, injunction and damages against the City of Hialeah. The complaint alleged, *inter alia*, that the City's passage of the 1987 ordinances violated the Santerias' constitutional rights under the First and Fourteenth Amendments; it did not challenge the Florida statute upon which Ordinance No. 87-40 was based.

The findings of the district court, after a seven day bench trial, are not contested here. See Appendix to Petition ["Pet. App."] A3, 723 F. Supp. 1467 (S.D. Fla. 1989):

The Santeria religion is practiced by approximately 50,000 adherents in South Florida, Pet. App. A6, 723 F. Supp. at 1470, with smaller groups located in other parts of the United States including Washington, D.C. Practitioners sacrifice a wide variety of animals during ceremonies, including chickens, pigeons, doves, ducks, guinea fowl, goats, sheep and turtles. Pet. App. A9, 723 F. Supp. at 1471. The district court estimated, based on testimony introduced by the Santerias' themselves, that 12,000 to 18,000 animals are sacrificed during initiation ceremonies alone in South Florida each year, Pet. App. A15-A16 n.22, 723 F. Supp. at 1473 n.22; the animals often are treated in an inhumane fashion prior to sacrifice, Pet. App. A17-A18, 723 F. Supp. at 1474; and the methods used to sacrifice

these animals are cruel, Pet. App. A14-A15, 723 F. Supp. at 1473, for example puncturing an animal's neck by stabbing a knife into the side of its neck, Pet. App. A12-A13, 723 F. Supp. at 1472. The court also concluded that children witnessing brutal animal sacrifices could suffer detrimental psychological effects. Pet. App. A19-A22, 723 F. Supp. at 1475-76. It also found that the indiscriminate disposal of carcasses in public places can create a health hazard. Pet. App. A18-A19, 723 F. Supp. at 1474-75.

On appeal, the Santerias argued that the district court's decision was inconsistent with this Court's intervening decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). They did not, however, contest the district court's extensive findings of fact. The court of appeals summarily affirmed. Pet. App. A1, 936 F.2d 586 (11th Cir. 1991). On March 23, 1992, this Court granted certiorari.

SUMMARY OF ARGUMENT

The City of Hialeah's general prohibition against the cruel or unnecessary killing of animals (Ordinance No. 87-40) is a neutral and generally applicable law which, under the Court's ruling in *Employment Division v. Smith*, can be applied to religious activities whether or not it serves a compelling state interest. Hialeah's subsequently enacted ordinances, which *inter alia* define ritual animal sacrifice, simply clarify that such practices are also covered by this general prohibition and do not alter the conclusion that Hialeah's anti-cruelty law is a neutral and generally applicable prohibition.

In any event, the Hialeah ordinances advance several compelling state interests: The ritual sacrifice of animals is a barbaric practice that the state can justifiably ban, it jeopardizes the psychological welfare of people (especially children) who witness such conduct, and it creates serious health hazards. The failure to prohibit other forms of animal killing, such as the euthanasia of strays, which promotes public health and animal welfare, or hunting and fishing, which have never been considered cruel or unnecessary, in no way undermines the City's vital interests in banning the repugnant practice of animal sacrifice by whomever it is practiced.

ARGUMENT

I. THE CITY OF HIALEAH'S ANIMAL CRUELTY ORDINANCES ARE NEUTRAL LAWS OF GENERAL APPLICATION THAT DO NOT VIOLATE THE SANTERIAS' FREE EXERCISE RIGHTS

The Santerias' entire argument is premised on a mischaracterization of the City of Hialeah ordinances. Properly construed, those ordinances represent a neutral and generally applicable law banning conduct that is universally condemned. Under the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), such laws are not invalid under the Free Exercise Clause of the First Amendment simply because they prohibit conduct that some persons deem central to their religion.

A. Ordinance No. 87-40 And Florida's Statute Prohibiting The Unnecessary Or Cruel Killing Of Animals Are Neutral And Generally Applicable Laws That Can Be Applied To Religious Conduct Without Violating The Free Exercise Clause Of The First Amendment.

The Santerias challenged all four animal cruelty ordinances adopted by the City of Hialeah in 1987. However, the first ordinance, No. 87-40, only incorporates into the City's code a state statute prohibiting cruelty to animals that was first enacted in 1901 and that the Santerias do not challenge. FLA. STAT. § 828.12. Moreover, the state statute incorporated by Ordinance No. 87-40 only added to the prior Hialeah anti-cruelty law a specific prohibition on the cruel or unnecessary *killing* of an animal.^{3/} Most state and many local jurisdictions in this country have laws in force similar to the Florida statute and Hialeah Ordinance No. 87-40. See, e.g., MODEL PENAL CODE § 250.11 (1985), at 426-27; D.C. CODE ANN. § 22-801 (1981); N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1991).

Neutral and generally applicable laws against the cruel or unnecessary killing of animals, in and of themselves, prohibit the ritual sacrifice of animals. Indeed, the district court held that even if "the [Hialeah] ordinances were invalid, Plaintiffs would still be prohibited from performing ritual sacrifices" under Florida's general anti-cruelty law. Pet. App. A29, 723 F. Supp. at 1479, *citing* Op. Fla. Att'y Gen. 87-56 (1987) (ritual killing of an animal

^{3/} The City had a longstanding prohibition against "unnecessarily or cruelly beat[ing] or mutilat[ing] any animal." City of Hialeah Code § 6.5.

does not constitute a "necessary" killing).^{4/} Thus, just as in *Employment Division v. Smith*, the Santerias' conduct is illegal as a matter of state law and is therefore unprotected by the Free Exercise Clause of the First Amendment. Indeed, in *Smith*, this Court rejected the argument that the Free Exercise Clause "required religious exemptions from civic obligations" imposed generally on the citizenry by pointing to animal cruelty laws as an example of such neutral and generally applicable laws. 494 U.S. at 888-89 (citing the decision of the district court in this case).

While anti-cruelty laws are sufficiently general to withstand challenge under the Free Exercise Clause, they are not so general as to be vulnerable to claims of undue vagueness or overbreadth.

1. Anti-Cruelty Laws Are Not Vague.

"[T]he majority of state courts confronted with this issue have upheld the constitutionality of cruelty to animal statutes against claims of unconstitutional vagueness." *Wilkerson v. State*, 401 So. 2d 1110, 1111 (Fla. 1981) (collecting cases). See also *People v. Bunt*, 462 N.Y.S.2d 142, 146 (N.Y. Just. Ct. 1983) ("Statutes similar to New York's have been upheld as constitutional by other state courts and certainly represent a reasonable extension of the state's police powers."). In *Wilkerson*, the Supreme Court of Florida held that the term "unnecessarily" as used in the state's anti-cruelty law was not unconstitutionally vague:

^{4/} "[O]pinions of the attorney general are persuasive and entitled to great weight in construing Florida Statutes." *State v. Office of Comptroller*, 416 So. 2d 820, 822 (Fla. App. 1982); *Perry v. Larson*, 104 F.2d 728, 730 (5th Cir. 1939).

"The particular words complained of, 'unnecessarily or excessively' are not vague when considered in the context of the entire Statute and with a view to effectuating the purpose of the act. The fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness. Criminal laws are not 'vague' simply because the conduct prohibited is described in general language."

401 So. 2d at 1112 (quoting *Campbell v. State*, 240 So. 2d 298, 299 (Fla. 1970), *appeal dismissed*, 402 U.S. 936 (1971)). See also *Tuck v. United States*, 467 A.2d 727, 731-33 (D.C. 1983), *aff'd*, 477 A.2d 1115 (1984); *State v. Tweedie*, 444 A.2d 855, 857 (R.I. 1982); *State v. Wilson*, 464 So. 2d 667, 668 (Fla. App. 1985) ("It would be impossible to draft a statute to encompass all situations in which treatment of an animal would be cruel . . .").

Moreover, this Court previously has sustained the application of broadly worded laws to religious conduct. In *Cleveland v. United States*, 329 U.S. 14 (1946), the Court decided that the broad residual clause in the Mann Act, 36 Stat. 825 (1910) (current version at 18 U.S.C. § 2421), prohibiting, *inter alia*, the interstate transportation of a woman "for any other immoral purpose," could be used to prosecute Mormons practicing polygamy. The Court rejected petitioners' argument that the Mann Act only prohibited commercialized sexual vice, observing that "polygamous practices have long been branded as immoral in the law." 329 U.S. at 19. The Court also rejected petitioners' free exercise defense:

[I]t has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. . . . Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard.

Id. at 20.^{5/}

Finally, should the Florida anti-cruelty statute or corresponding ordinance be applied in a selective fashion to their religious conduct, the Santerias could always bring an equal protection challenge alleging discriminatory enforcement.^{6/} See *Employment Division v. Smith*, 494 U.S. at 886 n.3; *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (public park law held unconstitutional because "a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects"); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (same). However, in a facial challenge of the sort now before the Court, the fear of selective enforcement does not provide a basis for finding that anti-cruelty laws are unconstitutionally vague.

^{5/} The Court has held laws challenged on free exercise grounds unconstitutionally vague when licensing schemes are involved because of the discretion that such laws place in the hands of the licensor. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Of course, anti-cruelty laws are not vulnerable to the same risk of discriminatory application. See *id.* at 306-07 (distinguishing a licensing system for the solicitation of funds from penal laws aimed at protecting citizens from fraudulent conduct).

^{6/} In an aspect of the decision in this case that the Santerias did not appeal, the district court rejected claims of harassment and discriminatory enforcement. Pet. App. A47-A49, 723 F. Supp. at 1487-88.

2. Anti-Cruelty Laws Are Not Overbroad.

Overbreadth arguments have proven equally unavailing for those charged with violations of animal cruelty laws. See *State v. Todd*, 468 N.W.2d 462, 466 (Iowa 1991); *State v. Kaneakua*, 597 P.2d 590, 594 (Haw. 1979). Indeed, such arguments have been rejected by two lower courts faced with free exercise challenges brought by Native Americans charged with the unlawful killing of animals in furtherance of religious activities:

The possibility that a statute might be unconstitutionally applied to certain religious practices does not render it void on its face where the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.

United States v. Billie, 667 F. Supp. 1485, 1495 (S.D. Fla. 1987) (rejecting Seminole's free exercise challenge to a conviction for killing a Florida panther in violation of the Endangered Species Act). See also *United States v. Thirty Eight (38) Golden Eagles*, 649 F. Supp. 269, 277-78 (D. Nev. 1986) (rejecting Native American's free exercise challenge to a civil penalty imposed for violations of the Eagle Protection Act).

* * * *

In sum, the Santerias do not and cannot plausibly argue that Ordinance No. 87-40 or the Florida statute on which it is modeled infringe their free exercise or other constitutional rights. Because that ordinance and statute, standing alone, are sufficient to condemn the Santerias'

"unnecessar[y] or cruel[]" killing of animals, and because, as we next show, the other challenged ordinances only clarify the scope of the general prohibitions contained in Ordinance No. 87-40 and the state statute, the Santerias cannot succeed in their attack on the judgment below.

B. Ordinances No. 87-52, No. 87-71 and No. 87-72 Do Not Target Only Religious Conduct.

The other three ordinances at issue in this case, No. 87-52 (prohibiting, *inter alia*, the possession of animals intended for sacrifice or slaughter), No. 87-71 (prohibiting the sacrifice of animals) and No. 87-72 (prohibiting the slaughter of any animals in premises not properly zoned for that purpose), were adopted by the City of Hialeah during September 1987, just three months after Ordinance No. 87-40 was passed. The term "sacrifice," as used in both Ordinance No. 87-52 and No. 87-71, is defined as meaning "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The September ordinances are more specific in scope than No. 87-40, but they are no less neutral.²⁷

²⁷ The Santerias emphasize that the challenged ordinances were adopted only after their plans to conduct sacrifices were made public. Pet. Br. at 14. That fact is immaterial. It was similarly true that prohibitions against polygamy, such as the Anti-Bigamy Act of 1862 upheld in *Reynolds v. United States*, 98 U.S. 145 (1879), were enacted in response to the growth of the Mormon church in the western United States. See Whitson, *American Pluralism*, Thought 492, 521 (1962). The fact that a religious practice brings to light a problem of widespread concern and elicits a general prohibition does not shield the religious group from that prohibition.

Hialeah's September ordinances only clarify that ritual animal sacrifice was prohibited under the general prohibition found in Ordinance No. 87-40. The scope of these clarifying ordinances was not restricted to animals tortured and killed in religious ceremonies; ritual animal sacrifice would include non-religious conduct such as the initiation practices of fraternal organizations. Anti-cruelty laws frequently list a series of prohibited acts by way of illustration: Their "purpose [i]s to provide a punishment for cruelty to animals and to make clear this general purpose [these laws] enumerate[] a series of acts or omissions which might constitute such cruelty." *Bunt*, 462 N.Y.S.2d at 144.

The Santerias confuse the terms "ritual or ceremony" used in Ordinances No. 87-52 and No. 87-71 with the term "religious." These terms are not coextensive. Although religious ceremonies are rituals, not all rituals are religious and the term ceremony has an even broader reach. Thus, the mere use of the term "ritual" in a statute or ordinance does not constitute a free exercise violation. See *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.) (rejecting Free Exercise and Establishment Clause challenges to the Federal Humane Slaughter Act, which uses the term "ritual"), *aff'd*, 419 U.S. 806 (1974). See also *Davis v. Beason*, 133 U.S. 333, 335-36 n.1 (1890) (upholding an Idaho statute that made persons ineligible to vote or hold public office if they were polygamists or "member[s] of any order . . . which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy . . . either as a *rite or ceremony* of such order" (emphasis added)).

Thus, it is simply inaccurate to suggest that Hialeah prohibited solely or even primarily religious conduct when

it outlawed the cruel or unnecessary killing of animals. Florida's anti-cruelty laws are applied to a variety of secular activities: Cockfighting is unlawful in Florida, and the state's Attorney General recently issued an opinion that the killing of an animal for the purpose of using its carcass in the training of greyhounds violates the state's anti-cruelty statute. Op. Fla. Att'y Gen. 90-29 (1990). Bullfighting, a popular sport in Spanish countries, is also prohibited in Florida, see *C.E. America v. Antinori*, 210 So. 2d 443, 446 (Fla. 1968) (bloodless bullfighting violates state anti-cruelty statute), as well as in other states, see *Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises*, 237 A.2d 342, 344-46 (Pa. 1968).^{8/} Plainly, the Hialeah ordinances are not narrowly focused only on the killing of animals for religious reasons.

C. Ordinances No. 87-52, No. 87-71 and No. 87-72 Are Part Of A Neutral And Generally Applicable City Prohibition Against Animal Cruelty.

Petitioners err in their analysis of the legislative purpose underlying the September 1987 ordinances. In reviewing legislation, courts strive to construe similar enactments *in pari materia*, and this canon of construction "makes the most sense when the statutes were enacted by the same legislative body at the same time." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). Moreover, where existing legislation is of a general nature and indicative of settled policy, "new enactments of a fragmentary

^{8/} Courts long ago held that the shooting of tame pigeons for sport violated anti-cruelty laws. See *Waters v. People*, 46 P. 112 (Colo. 1896); *State v. Porter*, 16 S.E. 915 (N.C. 1893).

nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it" *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 396 (1934).

Adopted shortly after Ordinance No. 87-40 (which itself simply reiterated a long-standing state and municipal policy against cruelty to animals), the September ordinances must be construed in the context of the more general law that they were clarifying. The district court's analysis of Hialeah's ordinances, which the Court of Appeals adopted, fully comports with the interpretive approach commanded by this Court. The Santerias' argument, which treats Ordinance No. 87-40 as an afterthought, inverts the sequence of enactment.

The September ordinances define and separately prohibit ritual animal sacrifice, thereby serving as notice or "gap-filling" measures designed to clarify and refine the broad scope of Ordinance No. 87-40. Evidently, some groups believed they were exempt from the animal cruelty laws of the State of Florida and City of Hialeah because of a state provision exempting "ritual slaughter." FLA. STAT. § 828.22. Indeed, before the district court, the Santerias argued that the state's exemption for ritual slaughter applied to it and preempted the Hialeah ordinances. Pet. App. A30-A33, 723 F. Supp. at 1480-81.^{9/}

^{9/} Now the Santerias take the position that the ordinances discriminate between religions because Jewish kosher slaughter is protected as a matter of state law. But the state provision does nothing more than exempt kosher slaughter from the humane methods requirement applicable in commercial slaughterhouses. As there are no commercial slaughterhouses permitted in the City of Hialeah, Pet. App. A33, 723 F. Supp. at 1481 n.46, there is no kosher slaughter in the City.

The three ordinances adopted by the City in September 1987 made clear that no such exemption from its blanket prohibition on animal cruelty was intended. Thus, the district court found that:

[The ordinances] *clarify* that religious sacrifice of animals is not included in the exemption provided for ritual slaughter in kosher slaughterhouses, and that animal sacrifices violate the anti-cruelty statute of the State of Florida, and the various zoning regulations of the City of Hialeah.

Pet. App. A23, 723 F. Supp. at 1476 (emphasis added). After first noting that Ordinance No. 87-40 nowhere mentions religion or ritual, the district court explained that Ordinance No. 87-52 (which was amended in turn by No. 87-71) "was not meant to single out persons engaged in ritual sacrifice, but to put those persons on notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter, done in slaughterhouses." Pet. App. A39, 723 F. Supp. at 1484.

When properly understood as gap-filling measures, the September ordinances are part of a neutral and generally applicable prohibition on animal cruelty. The net effect of Hialeah's legislative enactments is a coherent response to problems arising from the cruel and unnecessary killing of animals within the City limits. *See Jones v. Butz*, 374 F. Supp. at 1293 (reading the Federal Humane Slaughter Act as a whole, rather than focusing purely on the challenged provision, the court held that the Act served a secular legislative purpose even though "one of the provisions coincided with the method for Jewish ritual slaugh-

ter"). The Santerias' argument to the contrary misapprehends the scope of the ordinances. The Hialeah ordinances do not draw a distinction between religious and secular motivations for torturing or killing animals;^{10/} the ordinances broadly prohibit all cruelty to animals and put all groups on notice that ritual sacrifice is included in this general prohibition. Under the Court's ruling in *Employment Division v. Smith*, that should end the constitutional inquiry.

II. ANIMAL CRUELTY LAWS ADVANCE COMPELLING STATE INTERESTS.

Because the ordinances taken as a whole create a neutral and generally applicable prohibition on cruelty to animals, the City of Hialeah need not advance any compelling state interest to justify its enactments. *See Employment Division v. Smith*, 494 U.S. at 879-86. However, even were such a showing of compelling state interest required in this case, the lower courts were fully justified in finding that the Hialeah ordinances advance several interrelated and compelling state interests in promoting animal welfare and public health.

^{10/} The Santerias erroneously assert that the September ordinances "permit" other types of animal cruelty. However, the only other form of killing addressed by these ordinances is slaughter, and the ordinances simply reiterate the relevant provisions in the state statute that slaughter be confined, with limited exceptions, to properly licensed establishments. In any event, Hialeah does not permit the operation of slaughterhouses within the City. Pet. App. A33, 723 F. Supp. at 1481 n.46.

A. Prohibitions On The Cruel Or Unnecessary Killing Of Animals Promote Several Compelling Governmental Interests.

The prevention of cruelty to animals promotes a number of compelling state interests. The district court found that animals used in Santeria worship suffer before and during ritual sacrifice. Pet. App. A12-A18, 723 F. Supp. at 1472-74.^{11/} Although the common law viewed animals simply as property,^{12/} states began enacting statutes to protect animals against such mistreatment more than a century ago. Pointing out that by 1913 all 50 states and the District of Columbia had adopted anti-cruelty laws, one court observed that "[i]t has long been the public policy of this country to avoid unnecessary cruelty to animals." *Humane Society v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986). Most of these states specifically prohibit the cruel or unnecessary killing of animals.

Congress has enacted a number of laws to protect animals, including the Humane Methods of Slaughter Act, 7 U.S.C. § 1901 *et seq.*, and the Animal Welfare Act, 7

^{11/} The Santeria religion has been associated with terrible cruelty toward animals. The Santerias here effectively concede that other groups may sacrifice animals in extremely brutal ways, with all the attendant risks to public health and safety. It is of no consequence that their own methods of killing may be somewhat more refined than the methods used by other groups that sacrifice animals for purposes of evaluating the compelling interests advanced by the challenged ordinances.

^{12/} See *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979) (rejecting the nineteenth century legal fiction that wild animals are owned by the state, while reaffirming the state's regulatory interest in their preservation).

U.S.C. § 2131 *et seq.* Indeed, it is the declared "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. § 1901. In the House Report accompanying the 1978 amendments to the Humane Methods of Slaughter Act, Congress explained that the original Act "had its genesis in concern for the humane treatment of animals" H.R. Rep. No. 1336, 95th Cong., 2d Sess. 3 (July 10, 1978). The Animal Welfare Act "represent[ed] a continuing commitment by Congress to the ethic of kindness to dumb animals." H.R. Rep. No. 1651, 91st Cong., 2d Sess. 1 (December 2, 1970). Even the Internal Revenue Code recognizes this ethic, granting tax exempt status to organizations involved in the prevention of cruelty to animals. 26 U.S.C. § 501(c)(3).

Laws against cruelty to animals, including animal sacrifice, reflect a deep-seated revulsion against specific practices in which animals suffer abuse. This interest is a powerful one, with roots wholly unrelated to the suppression of religion. More than a century ago, laws against polygamy were upheld by the Court on a similar basis, namely the long-standing cultural revulsion against the practice:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

Reynolds v. United States, 98 U.S. 145, 164 (1879). Subsequent Court decisions were even more emphatic in their condemnation of the practice:

The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced.

Mormon Church v. United States, 136 U.S. 1, 49-50 (1890) (describing polygamy as a "barbarous practice," "nefarious doctrine," and "blot on our civilization"); *Davis v. Beason*, 133 U.S. 333, 341 (1890) ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."). The Court in *Davis* emphasized that "[c]rime is not the less odious because sanctioned by what any particular sect may designate as religion." 133 U.S. at 345. Likewise, the cruel or unnecessary killing of animals is no less offensive when performed during religious ceremonies.

Laws for the prevention of cruelty to animals, especially cruelty like that practiced by the Santerias in an open and obvious fashion, also are concerned with the welfare of the community. Because "cruelty to animals is an offense 'against public morals, which the commission of cruel and barbarous acts tends to corrupt,'" anti-cruelty "statutes are 'directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts.'" *Animal Legal Defense Fund v. Provimi Veal Corp.*, 626 F. Supp. 278, 280 (D. Mass.) (citations omitted), *aff'd*, 802 F.2d 440 (1st Cir. 1986).

Over the centuries the disposition to look upon such brutalities [to animals] with favor or approval has gradually lessened, and compassion and concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to man's better instincts and so offensive to his finer sensibilities that it is demeaning to morals.

Peck v. Dunn, 574 P.2d 367, 369 (Utah) (footnote omitted), *cert. denied*, 436 U.S. 927 (1978). Exposure to animal sacrifice will make individuals less inhibited about treating animals as objects and subjecting them to cruelty, a vicious cycle that the ordinances seek to avoid.

The state has a vital interest in protecting participants and members of an audience witnessing conduct of the sort at issue here, whether it occurs during a religious ceremony or at a cockfight or bullfight. Indeed, "courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony,"^{13/} a less traumatic event than the ones regularly engaged in by the Santerias in this case. This

^{13/} *McDaniel v. Pary*, 435 U.S. 618, 628 n.8 (1978). See *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom. Bunn v. North Carolina*, 336 U.S. 942 (1949) (cited in *Smith*, 494 U.S. at 889). One of the snake handling decisions upheld a state statute which provided that: "No person shall display, handle or use any kind of snake or reptile in connection with any religious service or gathering." *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (Ky. App. 1942) (emphasis added).

state interest is particularly strong when members of the audience include children.^{14/} See *New York v. Ferber*, 458 U.S. 747, 756-58 (1982).

The district court found that children of all ages witness Santeria animal sacrifices and are sometimes themselves the focus of initiation ceremonies. Pet. App. A16, 723 F. Supp. at 1474 n.24. The district court concluded that ritual animal sacrifice would seriously jeopardize the psychological well-being of children.^{15/}

The evidence at trial established that exposure to the ritual sacrifice of animals imperils the psychological well-being of children and increases the likelihood that a child will become more aggressive and violent. Based on the expert testimony, the City has shown that the risk to children justifies the absolute ban on animal sacrifice.

^{14/} Although the court of appeals expressly declined to rely on this rationale, this Court may clearly do so. See *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

^{15/} These findings accord with the relevant literature on the subject. See Felthous & Kellert, *Violence Against Animals and People: Is Aggression Against Living Creatures Generalized?*, 14 BULL. AM. ACAD. PSYCHIATRY LAW 55 (1986). The authors of this study noted that a number of the felons they interviewed had reported observing or participating in the killing of animals. See *id.* at 59, 61, 62 (noting that one subject provided a good illustration of the "social learning of aggressive behavior toward animals from a parent").

Pet. App. A44, 723 F. Supp. at 1486. This interest clearly sustains the prohibition of ritualistic animal sacrifice; in none of the other examples cited by the Santerias, e.g., the boiling of lobsters or killing of vermin, is an audience likely to observe the brutal killing of animals.

The Court has held that the risk of emotional injury to children outweighs the countervailing religious rights of parents. In *Prince v. Massachusetts*, 321 U.S. 158 (1944) (cited in *Employment Division v. Smith*, 494 U.S. at 889), a Jehovah's Witness challenged a state law applied to prohibit religious leafletting by minors. After emphasizing the state's undoubted interest in child welfare, even in cases where conflicts arise between state interests and parental or religious rights, the court observed that propagandizing "create[s] situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face." *Id.* at 169-70 (adding that "emotional excitement and psychological or physical injury" could result). The Court also pointed out that the state's power to safeguard the psychological welfare of children "is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct." *Id.* at 170. See also *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488, 504 (W.D. Wash. 1967) (state interest in child welfare justified authorizing blood transfusions for children over parent's religious objections), *aff'd*, 390 U.S. 598 (1968).

In addition to promoting animal welfare and protecting the psychological well-being of children and other participants, Hialeah's prohibition on the unregulated killing of animals in the City also helps prevent the spread

of disease to humans. The courts below found that the Hialeah ordinances furthered a vital government interest in the prevention of disease. Pet. App. A42-A44, 723 F. Supp. at 1485. States have a compelling interest in controlling the spread of diseases harbored by animals. See *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding against a Commerce Clause challenge an embargo of live baitfish to protect against importation of diseased fish); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (similar holding re inspection of imported cattle); *Conner v. Carlton*, 223 So. 2d 324 (Fla. 1969) ("brucellosis disease in domestic animals represents a dangerous subject of 'compelling public interest' sufficient to justify making an exception to the fundamental rule of due process"), *appeal dismissed*, 396 U.S. 272 (1969). Indeed, this Court has held that "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease." *Prince v. Massachusetts*, 321 U.S. at 166-67. Animal welfare and public health represent interrelated and compelling state interests.

B. The Hialeah Ordinances Advance These Interrelated And Compelling State Interests.

The Santerias argue that a compelling interest must justify the distinction drawn by the ordinances between ritual sacrifice, on the one hand, and the killing of animals for food and safety reasons, on the other hand, citing the Court's recent decision in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 112 S. Ct. 501 (1991). However, in *Simon & Schuster*, the statute "single[d] out income derived from expressive activity for a burden the State places on no other income, and [was] directed at works only with a specified content." 112 S. Ct. at 508; see also *id.* at 512 (Kennedy, J., concurring in judgment) ("The

New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written."). Here, by contrast, the ban on "ritual" cruelty applies to religious and non-religious conduct alike.

In arguing that the ordinances are not narrowly tailored to achieve compelling state interests, the Santerias inaccurately contend that the ordinances "permit" a number of exceptions for secular activities that would otherwise constitute animal cruelty. They enumerate a litany of supposed gaps in the City's prohibition on animal cruelty, including hunting, fishing, selling meat, boiling lobsters, euthanizing strays, and the destruction of vermin by exterminators. However, none of these examples involve activities that would be considered "cruel" or "unnecessary" killings.^{16/} For example, in the case of euthanasia of strays by humane societies, countervailing public health and animal welfare concerns justify the killing and the procedure is carefully regulated to ensure that no cruelty is involved. FLA. STAT. §§ 828.05-828.065.

Moreover, even if some of the other examples raise legitimate animal welfare concerns, none involve the additional compelling state interests in controlling the spread of disease and avoiding psychic impact on participants associated with ceremonial killings. Hunting, fishing, and slaughter of livestock are widely accepted means of provid-

^{16/} In the Eighth Amendment context, a punishment will be judged "cruel and unusual" based on either common law norms in 1789 or objective evidence of America's "evolving standard of decency." See *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

ing food, and these practices do not raise the same concerns as ceremonial killings. The revulsion against animal cruelty for its own sake is quite different from other forms of animal killing which are not prohibited in Florida (or anywhere else for that matter).

[D]efendants contend that . . . hunting and fishing, which are regulated but not wholly prohibited by statute, are just as cruel to animals as cockfighting exhibitions. Nevertheless, reasonable grounds exist for the statutory classification. . . . [B]esides providing sport, hunting and fishing, unlike cockfighting, provide food; and hunting benefits certain species by controlling population levels.

State v. Ham, 691 P.2d 239, 241 (Wash. App. 1984). "The Legislature may prohibit cockfighting without proscribing all activities that inflict cruelty upon animals." *Id.* Similarly, a state may outlaw the act of killing animals for the sake of causing death without also prohibiting the killing of animals for purposes that advance or at least do not contravene compelling state interests.

In any event, even if Hialeah has not addressed every situation where the compelling state interests in public health and animal welfare may intersect, the ordinances are not invalid for underinclusiveness. The City of Hialeah's ordinances fall within the rule that allows legislation to address issues in seriatim fashion without being underinclusive. A state is "not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way." *Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935). In *Williamson v. Lee Optical*, 348 U.S. 483 (1955),

the Court addressed the underinclusiveness problem with the following observation:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id. at 489; see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). In a decision upholding the Animal Welfare Act against constitutional challenge, the D.C. Circuit rejected the claim that Congress had acted in an unjustly discriminatory fashion when it "recognized a problem of inhumanity to animals but attacked only a part of it" by imposing requirements "upon producers of animal acts and other performances, but not upon operators of rodeos and other enterprises" *Haviland v. Butz*, 543 F.2d 169, 176-77 (D.C. Cir. 1976). This Court has applied the same analysis to underinclusiveness arguments raised in the First Amendment context. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986) (rejecting claim that adult theaters had been singled out for discriminatory treatment).

C. The Risks To Public Health And Animal Welfare Are Not Speculative.

The Santerias complain that the district court could only identify speculative risks associated with animal sacrifice. This represents a belated effort to challenge findings of fact which were not contested in the Court of

Appeals. That court noted in its per curiam decision that the district court's "extensive findings of fact" had not been contested by either party. Pet. App. A2.

The district court found that the ritual sacrifice of animals in South Florida was becoming a serious problem, estimating on the basis of numbers provided by the Santerias that between 12,000 and 18,000 animals were being sacrificed annually in Dade County. Pet. App. A15, 723 F. Supp. at 1473 n.22. The court found that many of these animals were purchased through stores known as botanicas and subjected to "conditions [which] can cause intense suffering by the animal." Pet. App. A17-A18, 723 F. Supp. at 1474. The court also found that "the method used in sacrificing the animals is not humane, but in fact causes great fear and pain to the animal." Pet. App. A14-A15, 723 F. Supp. at 1473. The court also made detailed findings concerning the hazards of disease outbreaks associated with the indiscriminate disposal of animal remains, Pet. App. A18-A19, 723 F. Supp. at 1474-75, and the risk to the psychological welfare of children. Pet. App. A19-A22, 723 F. Supp. at 1475-76. The Santerias cannot now attempt to reopen the record and relitigate these findings.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 17, 1992

JUL 31 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,

—and—

ERNESTO PICHARDO,

Petitioners,

—against—

CITY OF HIALEAH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF AMICUS CURIAE OF INTERNATIONAL SOCIETY FOR
ANIMAL RIGHTS, CITIZENS FOR ANIMALS, FARM ANIMAL
REFORM MOVEMENT, IN DEFENSE OF ANIMALS, PER-
FORMING ANIMAL WELFARE SOCIETY, and STUDENT
ACTION CORPS FOR ANIMALS, IN SUPPORT OF RESPONDENT
CITY OF HIALEAH, FLORIDA**

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_____, <i>Women Break 107-Day Fast After Learning of Parole</i> , AP, Dec. 3, 1987	18
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_____, <i>Exempt Organizations — Charitable Contributions Made to Venusian Church Disallowed</i> , Daily Report for Executives, Mar. 13, 1987, at H-12	18
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INTERESTS OF *AMICI CURIAE*¹

Amici curiae constitute a broad-based consortium of secular organizations dedicated to the humane treatment of animals. Though they come to this case holding diverse views and goals, the *amici curiae* agree that — as articulated in the 1641 Massachusetts Bay Colony “*Body of Liberties*” — “[n]o man [may] exercise any Tyranny or Cruelty towards any brute Creature”²

International Society for Animal Rights, founded in 1959 in the District of Columbia,³ now has some 25,000 members and supporters worldwide. Its chartered purposes include promoting “protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause [and seeking] to prevent nationwide causes of cruelty to and suffering in animals [and publishing materials] dealing with the individual aspects of animal welfare [and conducting] mass humane education . . . to foster mercy, compassion and respect for animals” *International Society for Animal Rights* is often requested by other animal rights organizations to furnish memoranda and *amicus curiae* briefs in animal rights cases throughout the United States.

Citizens for Animals, organized two decades ago, is a grassroots national organization devoted to the promotion of animal rights. Like *International Society for Animal Rights*, and in furtherance of its constituents’ values, *Citizens for Animals* is committed to making its position known to the courts through the submission of *amicus curiae* briefs.

¹ *Amici* file this brief with permission of respondent; we understand that the blanket consent of petitioners has been filed with the Clerk of this Court.

² William H. Whitmore, *A Bibliographical Sketch of the Laws of the Massachusetts Colony From 1630 to 1686*, at 52 & 53 (1890).

³ The organization’s name was originally *National Catholic Society for Animal Welfare*. In 1972 it was changed to *Society for Animal Rights* and then to *International Society for Animal Rights*.

Farm Animal Reform Movement is a national, non-profit, public interest organization formed in 1981 by animal, consumer, and environmental protection advocates to expose and stop animal abuse and other destructive impacts of factory farming.

In Defense of Animals is a national, non-profit organization with over 50,000 members. It pursues change in the treatment of animals in industries that exploit them, in the lifestyles that support such industries, and in the attitudes that prevent recognition of the lives and rights of animals. It also attempts to stop current abuses in laboratory research and elsewhere. It pursues these goals through all available legal means.

Performing Animal Welfare Society, founded in 1985, is dedicated to the rescue of performing and exotic animals from cruel confinement and performances of pain. It investigates reports of abused performing animals and captive wildlife; rescues animals through intervention, legislation, and outright purchase; shelters rescued animals on a 20-acre sanctuary in Galt, California; works for legislation to protect all performing and exotic animals from neglect and cruelty; and educates the entertainment industry, legislators and the general public in the humane handling and care of animals.

Student Action Corps for Animals is a national, non-profit educational organization whose membership is composed of students in junior high school, high school, and college. The organization provides support, information, and a communications forum in the form a newsletter, to adolescents and adult advisors. Many young people who are members strongly believe that animals have the right not to be exploited for human purposes. Most members follow this principle by striving not to exploit animals in their own lives, and by not participating in the use of animal lives for educational purposes. The organization is composed of students from every state in the country.

SUMMARY OF ARGUMENT

The Court should abandon the compelling state interest test, to the extent that it exists, in cases involving a constitutional claim *to act* contrary to law in the name of religion. *Amici* argue that while the compelling state interest test entered Free Exercise jurisprudence properly via cases involving religious *speech*, it is a mistake to apply that test in cases involving religious *action*. Where religious claims *to act* are raised, *heightened*, rather than *strict*, scrutiny is appropriate and the state should have to present the existence of an important and legitimate interest in order to constrain religious practices. Because the interests of the City of Hialeah are unquestionably important and legitimate, petitioners' claim of a purported constitutional right to sacrifice animals in that municipality should be rejected and the Court should affirm the judgment of the court of appeals.

ARGUMENT

For good reasons this Court has almost always been unreceptive to Free Exercise challenges where the claimed right of a party *to act* in the name of religion has clashed with an important and legitimate governmental interest. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Mormon Church v. United States*, 136 U.S. 1 (1890); *Hamilton v. Regents*, 293 U.S. 245 (1934); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *United States v. Ballard*, 322 U.S. 78 (1944); *Cleveland v. United States*, 329 U.S. 14 (1946); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968); *Gillette v. United States*, 401 U.S. 437 (1971); *Johnson v. Robison*, 415 U.S. 361 (1974); *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Hernandez*

v. Commissioner, 490 U.S. 680 (1989); *Smith v. Employment Div., Dept. of Human Resources*, 494 U.S. 872 (1990) (*Smith II*); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

Thus, from the very beginning of its Free Exercise jurisprudence, the Court has apparently realized that to permit citizens to do in the name of religion that which is proscribed by the legitimate laws of the state is to invite anarchy, permitting each man to be a floating island of private law governed only by the dictates of real or supposed religiously-motivated conscience. See *Reynolds*, 98 U.S. at 167. Conversely, however, the Court also apparently recognized early that the existence of the Free Exercise Clause and its history means, at the very least, that there must be no governmental intrusion whatsoever upon religious belief. See *id.* at 163. "Laws," the Court has written, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. This commonsensical — and necessary — belief/action dichotomy has been stressed repeatedly. Accordingly, compared to the twenty-two cases cited *supra* — where religious claims have lost out to a law prohibiting doing — are those cases involving government compulsion of belief, where the religious claimant has always handily won.⁴

⁴ Claims to polygamy, to exemption from ROTC training, to unfettered access to public by-ways, to exemption from child labor laws, to the fraudulent solicitation of funds, to exemption from blue laws, to withhold life-saving treatment from children, to exemption from being drafted into "unjust wars," to educational benefits despite conscientious objector status in alternate civilian service, to exemption from employer social security taxation, to favored tax status for racial discrimination, to exemption from minimum wage laws, to exemption from military dress code, to exemption from laws designed to curb welfare fraud, to exemption from prison regulations, to the preservation of the natural state of federal lands, to the tax-deductibility of the cost for participating in set-fee religious services, to take peyote, and to solicit contributions in an airport as part of a

(continued on next page...)

The latter type of cases, where the state has attempted to interfere with, or even force, belief are *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *McDaniel v. Paty*, 435 U.S. 618 (1978).⁵ In *Pierce* the inculcation of religious belief through parochial education was threatened by state-mandated secular education; in *Barnette* the religious belief of Jehovah's Witnesses that it is a sin to worship "graven images" such as a flag was threatened by a board of education resolution requiring a daily salute to the U.S. flag by school children; in *Torcaso* a notary public's freedom of belief and religion was threatened when he was denied a commission because of his refusal to declare his belief in God; in *Yoder* a state statute compelling children to attend school until age 16 threatened the Amish belief that remaining unworldly is essential to the maintenance of their religiously-mandated simple way of life; in *Wooley* the Jehovah's Witnesses' religious-based belief against fealty to the state was threatened by New Hampshire's requirement that all noncommercial vehicles have license plates bearing the state's motto, "Live Free or Die"; and in *McDaniel* the strong religious beliefs that impel some to the clergy was threatened by a state constitutional provision barring ministers

⁴(...continued from preceeding page)

religious ritual, all failed in light of the important and legitimate governmental interests they opposed.

⁵ As noted by the Court in *Smith II*, 494 U.S. at 882, *Barnette* and *Wooley* were decided exclusively on free speech grounds, though they also involved freedom of religion. Moreover, a plurality of the Court in *McDaniel* (BURGER, C.J., and POWELL, REHNQUIST, and STEVENS, JJ.) decided the case on the basis of Free Exercise action while three Justices (BRENNAN, MARSHALL, and STEWART, J.J.) concurred on the basis of Free Exercise belief. Though these cases are not necessary to carry the argument, they are raised here because religious belief was, perforce, involved, and because they help reveal an undeniable thrust in the Court's jurisprudence. Cf. *Stromberg v. California*, 283 U.S. 359 (1931).

or priests from either house of the state legislature. *In all of these cases the threatened belief was vindicated*, the threatening law struck down, for, as JUSTICE JACKSON wrote for the Court in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," 319 U.S. at 642, and, as the Court reiterated in a somewhat different context, under the Free Exercise Clause "freedom to believe . . . is absolute." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Hence, analysis discloses that the action/belief dichotomy of this Court's Free Exercise jurisprudence has long been clear: religiously inspired action — sometimes, at least — can be regulated; religious belief cannot. *See also, e.g., Smith II*, 494 U.S. at 877 (Court holds religiously-inspired use of peyote is subject to state's drug laws while reiterating that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such'" (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)); *Bowen*, 476 U.S. at 699 ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute"); *Bob Jones Univ.*, 461 U.S. at 603 ("This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs However, '[n]ot all burdens on religion are unconstitutional'" (citations omitted) (quoting *Lee*, 455 U.S. at 257); *Gillette*, 401 U.S. at 461 (while Free Exercise Clause bars governmental regulation of religious beliefs, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government"); *Jehovah's Witnesses*, 390 U.S. at 598 ("The judgment is affirmed, *Prince v. Massachusetts*, 321 U.S. 158") (*per curiam* decision upholding three-judge district court dismissal of action wherein parents

claimed right to forbid blood transfusions for their children based on religious belief); *Braunfeld*, 366 U.S. at 603-04 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion") (WARREN, C.J., for plurality); *Ballard*, 322 U.S. at 87 ("With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with") (quoting *Davis*, 133 U.S. at 342).

Before turning to the "tests" used by the Court to determine when religious action may be regulated, it is important first to linger upon the actual nature of religious belief, examining why its protection has been held so absolute.⁶ The policy behind freedom of religious belief, it appears, is shared by the First Amendment as a whole and that policy involves the fostering and protection of

⁶ Some have suggested that as *belief* is the very predicate for the "exercise" of religion, it is expressly protected by the Constitution. But to say that freedom of religious belief is expressly protected by the Constitution is nothing more than to state a conclusion, shedding no light on *why* it is protected. *See, e.g., Prince*, 321 U.S. at 174 (freedom of religious belief is "of the very essence of a scheme of ordered liberty") (MURPHY, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Indeed, virtually all other rights expressly (and impliedly) protected or recognized by the Constitution can hardly claim the *absolute* protection from governmental interference routinely enjoyed by freedom of religious belief. Another rationale posited for this absolute freedom is that the belief prong of the Free Exercise Clause is the result of the long catalogue of human folly wherein governments have attempted to homogenize religious belief by law. *See Davis*, 133 U.S. at 342. This problem, however, is undoubtedly covered by the Establishment Clause and the jurisprudence that has emerged from it.

something which is seen as not only desirable in itself but as something that is necessary to the very preservation of free government: *the marketplace of ideas*. This has found manifold expressions in the opinions of this Court. Thus, in *Prince* the Court said that freedom of conscience and freedom of the mind are equally protected by the First Amendment because they are inseparable. JUSTICE RUTLEDGE astutely wrote for the Court:

"All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life."

321 U.S. at 164-65. And in *Cantwell* the Court stated:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

310 U.S. at 310; *see also id.* (essential characteristic of First Amendment liberties is that "many types of life, character, opinion and belief can develop unmolested and unobstructed"). And in *Wooley*, CHIEF JUSTICE BURGER noted that the First Amendment secures the right to proselytize religious, political, and ideological causes against the state's attempted invasion of the sphere of intellect and spirit. 430 U.S. at 714-15 (citing and quoting

Barnette, 319 U.S. at 642 (JACKSON, J., concurring) and *id.* at 642 (opinion of Court)); *see also Goldman*, 475 U.S. at 507 (rejecting Free Exercise claim of Air Force doctor to wear yarmulke noting deference due to military regulations as "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment"); *Wallace v. Jaffree*, 472 U.S. 38, 49-55 (1985) (noting freedom of conscience as unifying theme of First Amendment). This concept was most recently reiterated by JUSTICE KENNEDY in *Lee v. Weisman*, 60 U.S.L.W. 4723, 4726 (June 24, 1992) who, writing for the Court, noted that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment" For "[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Id.*

The reason, of course, for the importance of freedom of thought, denominated the "marketplace of ideas" (embracing the religious, political, philosophical, and other realms of the mind) — together with the rights to free speech, to free press, to freedom of association, to freedom of peaceable assembly, and, in our fifty-state federalist system, to the freedom of travel — is that the unimpeded exercise of these freedoms is the foundation upon which the existence of all our other rights depends. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 17 (1964); *Ballard*, 322 U.S. at 86; *Palko v. Connecticut*, 302 U.S. 319, 325, 326-27 (1937) *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969); *Stromberg v. California*, 283 U.S. 359, 369 (1931). Indeed, the freedom of thought and speech, considered together as one, perhaps occupies the preferred position in the Constitution, for "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko*, 302 U.S. at 327 (emphasis added). Thus considered, the underlying rationale is revealed behind noble

statements such as "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position," *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), and "the interpreters of the Constitution find the purpose [of the First Amendment] was to allow the widest practical scope for the exercise of religion and the dissemination of information," *id.* at 121 (REED, J., dissenting).⁷ So it is not surprising that it is in cases dealing with religious *speech* that one finds not only the initial applications of the First Amendment to the states, but an all-but absolute protection (like that accorded to religious belief) through employment of the compelling state interest test. As demonstrated *infra*, however, this laudable effort to protect religious *speech* led to the lamentable result that the compelling state interest test was indiscriminately, and erroneously, applied to the realm of religious *action*.

In *Schneider v. State*, 308 U.S. 147 (1939), citing "the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion," *id.* at 160, — rights that lie "at the foundation of free government by free men," *id.* at 161, and are "so vital to the maintenance of democratic institutions," *id.* — and adverting to the liberty to "impart information through speech or the distribution of literature," *id.* at 160, and to "the dissemination of information and opinion," *id.* at 163, this Court, *inter alia*, invalidated an ordinance that forbade unlicensed door-to-door solicitation and distribution of circulars as applied to a Jehovah's Witness's attempted profession and propagation of the faith. The test that

⁷ And thus is explained JUSTICE STONE's citation to *Pierce v. Society of Sisters* for the suggestion that when reviewing statutes directed at particular religious minorities, prejudice against such minorities may be "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Carolene Products*, 304 U.S. at 153 n.4. For without the ability to maintain and augment the number of believers through religious education, a religion loses much of its ability to protect itself through the political process.

JUSTICE ROBERTS applied for the Court was that "[i]n every case . . . where legislative abridgement of the rights [to freedom of speech] is asserted, the courts should be astute to examine the effect of the challenged legislation . . . [T]he courts [must] weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights," *id.* at 161.

There then followed *Cantwell v. Connecticut*, 310 U.S. 296 (1940), also written by JUSTICE ROBERTS. Citing *Schneider*, the Court for the first time held that the First Amendment's Free Exercise Clause applied to the States via the Due Process Clause of the Fourteenth Amendment, overturning the convictions of Jehovah's Witnesses under a statute which acted as a "prior restraint" upon "the dissemination of religious views or teaching." *Id.* at 304 (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (which was, of course, a pure speech/press case). Such censorship could not be countenanced, said the Court, because it implicated the religion's very right to survive, *id.* at 305, through "the solicitation of aid for the perpetuation of religious views or systems," *id.* at 307. Moreover, with regard to the conviction of one of the three Witnesses involved for breach of the peace, this Court equated "the free exercise of religion" with the "freedom to communicate information and opinion," *id.* at 307, and held that the conviction could not stand based on speech which, though offensive, did not amount to fighting words. *See id.* at 309. The test that the Court applied in this latter part of *Cantwell* was that a conviction for "only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion," *id.* at 310, had to fail "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State," *id.* at 311. Comparing the case before it to, *inter alia*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (HOLMES, J.) (which involved criminalization of *speech* that posed a clear and present danger to national security), *see Cantwell*, 310 U.S. at 311 n.10, the *Cantwell* Court held that "petitioner's communication,

considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question," *id.* at 311. Thus, yet another victory for the profession and propagation of *belief*, i.e., religious speech. *See id.* at 310 (manifestly revealing the "marketplace-of-ideas" basis for the holding). And thus, perhaps even more significant, the entrance of what came to be called the "compelling state interest test" into the Court's Free Exercise *speech* jurisprudence.

Hard on the heels of *Schneider* and *Cantwell* were more "Witness" cases — again and again vindicating their thwarted attempts at profession and propagation — virtually all of which were steeped in the language of First Amendment speech jurisprudence, carried over into Free Exercise. *See especially, Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946).⁸

During this time, of course, the Court's long-standing action/belief dichotomy was far from repudiated—indeed, it was reiterated repeatedly. *See Schneider*, 308 U.S. at 160; *Cantwell*, 310 U.S. at 304; *Cox*, 312 U.S. at 578; *Murdock*, 319 U.S. at 116; *Martin*, 319 U.S. at 143; *Prince*, 321 U.S. at 166-67; *Ballard*, 322 U.S. at 87; *Cleveland*, 329 U.S. at 20; *Braunfeld*, 366 U.S. at 603.

At this point, *amici* submit, the Court had articulated the proper state of Free Exercise jurisprudence: religious *belief* was absolutely protected (*Pierce*); religious *speech* was protected against all but compelling state interests (*Cantwell*, *Murdock*, *et al.*); and religious *action*, however, was capable of regulation if inimical to the health, safety, welfare, and morals of society (*Reynolds*, *Davis*, *Mormon Church*, *Cox*, *Prince*, *Ballard*, *Cleveland*, and *Braunfeld*). Thus, the Court's Free Exercise jurisprudence then matched a statute drafted by Thomas Jefferson that had been promulgated by the Virginia House of Delegates and

⁸ *See also Jones v. Opelika*, 319 U.S. 103 (1943); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

which read: "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain *the profession or propagation of principles* on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty"—"it is time enough for the rightful purposes of civil government, for its officers to interfere *when principles break out into overt acts* against peace and good order." An Act for Establishing Religious Freedom, 1785 Va. Stat., ch. xxxiv (*reprinted in* 12 Hening's Stat. 84, 85 (1823)) (emphasis added) (quoted by *Reynolds*, 98 U.S. at 163). "In these two sentences," this Court has acknowledged, "is found the true distinction between what properly belongs to the church and what to the State." *Reynolds*, 98 U.S. at 163.⁹

Amici respectfully suggest, therefore, that *the* fundamental error in this Court's Free Exercise jurisprudence occurred in *Sherbert v. Verner*, 374 U.S. 398 (1963).

The prelude to *Sherbert* came in JUSTICE BRENNAN's opinion in *Braunfeld*, dissenting from the Court's rejection of the claim of Orthodox Jews that Sunday blue laws impermissibly burdened the free exercise of their religion. JUSTICE BRENNAN's dissenting opinion foreshadowed the unseen manner in which the "'grave and immediate danger'" test, *Braunfeld*, 366 U.S. at 612 (BRENNAN, J., dissenting) (quoting *Barnette*), or the "compelling state interest" test, *id.* at 613 (*ipse dixit*), was permitted to seep into the religious *action* side from the belief and speech side of the Free Exercise

⁹ This concept found its most recent expression in the net result of two speech cases decided late last term, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992), and *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 60 U.S.L.W. 4761 (June 26, 1992) (*per curiam*). There, against the claimed right of a sect for its members to be able to "perform a ritual known as sankirtan . . . [w]hich consists of going into public places, disseminating religious literature and soliciting funds to support the religion," 60 U.S.L.W. at 4750 (internal quotations and citations omitted), a municipal airport's ban on solicitation was *upheld*, *id.* at 4753, but the airport's ban on distribution of literature was *struck down*, 60 U.S.L.W. at 4761.

Clause.¹⁰ "This exacting standard," wrote JUSTICE BRENNAN, "has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom — the freedom to believe and to practice strange and, it may be, foreign creeds — has classically been one of the highest values of our society." *Id.* at 612. JUSTICE BRENNAN then proceeded to cite, by way of example, *Murdock*, *Jones*, *Martin*, *Follett*, and *Marsh*. *Id.* In JUSTICE BRENNAN's opinion, these cases, together with *Barnette* — even though they dealt with the highly protected area of religious belief and religious speech — justified the application of the compelling state interest test so as to permit the *Braunfeld* claimants to act contrary to the law because of their religion.

JUSTICE BRENNAN, of course, carried the day two years later in *Sherbert*, where he wrote the opinion for the Court, and where it for the first time applied the compelling state interest test to a religiously-inspired claim to act. Adverting first to *Cantwell*, *Torcaso*, *Fowler*, and *Murdock* (all of which involved religious belief or speech), see *Sherbert*, 374 U.S. at 402, and while noting that certain religious conduct which has "invariably posed some substantial threat to public safety, peace or order" (notably omitting "morals," but citing *Reynolds*, *Prince*, and *Cleveland*), *id.* at 403, JUSTICE BRENNAN observed that the state's "incidental burden" on *Sherbert*'s free exercise could only be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" *NAACP v. Button*, 371 U.S. 415, 438." *Id.* (*Button*, of course, was a freedom of

¹⁰ See also *Braunfeld*, 366 U.S. at 607 (plurality opinion) ("If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect") (citing *Cantwell*). But see *id.* at 603-604 ("legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion").

association case.) In *Sherbert*, the state and its arguably important and legitimate interest lost; *Sherbert*'s claim to act in the name of religion prevailed. Thereafter, the results in *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987), were foreordained. And ever since *Sherbert* the Court had to deal with the tar baby called the compelling state interest test — sometimes working with it, see *Gillette*; *Johnson*; *Thomas*; *Lee*; *Bob Jones Univ.*; *Hobbie*; *Hernandez*, sometimes getting around it, see *Tony & Susan Alamo Found.*; *Lyng*; *O'Lone*; *Goldman*; *Smith I*, and sometimes coming out against it, see *Bowen*; *Smith II*.

The Court's decision to insist upon *compelling state interests* in the *action* side of Free Exercise was a mistake not because the free exercise of religion is unworthy of protection. It was a mistake because the otherwise unrestrained freedom to act contrary to law in the name of religion can relegate to oblivion *other important and legitimate interests* of an ordered society, interests which, while not "grave" or "compelling," are nonetheless basic to a *civilized* voluntary association of free men. Even as early as *Braunfeld*, the Court began to express concerns about restricting "the operating latitude of the legislature" whenever a claimant waved the flag of Free Exercise, see *Braunfeld* 366 U.S. at 606, a concern that the Court echoed in *Lee*, see 455 U.S. at 262. And most recently in *Smith II*, the Court again reiterated this concern:

"Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."

494 U.S. at 888 (internal quotation and citation omitted).

The Court's concern is especially justified given the allocation of burdens in a Free Exercise lawsuit. For in light of the deference accorded to legislative enactments when their constitutionality is

challenged in non-religious-based suits (where the plaintiff's injury is usually concrete, see *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984); see also *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842, 4853 (June 29, 1992) (BLACKMUN, J., dissenting)), there would be much to say in Free Exercise cases (where injury, perforce, is ephemeral) of requiring plaintiffs to prove by clear and convincing evidence that the government has prevented them from performing a religious duty.¹¹ Instead, as matters stand today, in a Free Exercise case the mere mention of religion causes some to believe that the usual presumption of constitutionality dissolves. See *Prince*, 321 U.S. at 167. Indeed, a religious claimant need not even show that the religious practice at issue is central to a faith. See *Smith II*, 494 U.S. at 886-87; *Hernandez*, 490 U.S. at 699. The belief impelling the claimant to act need only be religious, cf. *Yoder*, 406 U.S. at 235, and sincerely held, see *Hobbie*, 480 U.S. at 138 n.2 ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held"); *Bob Jones Univ.*, 461 U.S. at 602 n.28 ("The District Court found, on the basis of a full evidentiary record, that the challenges practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage"); cf. *Ballard*, 322 U.S. at 84; *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (drug-taking sect whose motto was "Victory Over Horseshit!" was not a sincere religion). And so long as plaintiff's religion "is burdened," *Thomas*, 450 U.S. at 718 (emphasis added), the defendant, the state, is then forced to justify the law. See *McDaniel*, 435 U.S. at 628-29 (state failed in proving that its once-arguably-important interest had not lost its validity with time). But see *id.* at 625

¹¹ See, e.g., *Reynolds*, 98 U.S. at 161; *Davis*, 133 U.S. at 341; *Mormon Church*, 136 U.S. at 18; *Schneider*, 308 U.S. at 159; *Murdock*, 319 U.S. at 108; *Prince*, 321 U.S. at 163; *Braunfeld*, 366 U.S. at 601; *Sherbert*, 374 U.S. at 399 n.1; *Thomas*, 450 U.S. at 710; *Lee*, 455 U.S. at 255; *Bob Jones Univ.*, 461 U.S. at 580, 602 n.28; *Goldman*, 475 U.S. at 513 (BRENNAN, J., dissenting); *Hobbie*, 480 U.S. at 138; *O'Lone*, 482 U.S. at 345 — all noting that a religious duty was at issue.

(against historical background Court would not "lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court").

The modern explosion of real and supposed religions under the putative protection of Free Exercise Clause jurisprudence also indicates the mistake of applying the compelling state interest test in cases involving religious action. For, while the Free Exercise Clause may once have been perceived to protect only Christianity or "established" religions, cf. *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985), it is now rightly held to extend its protection to all religious beliefs.

"We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents."

Zorach v. Clauson, 343 U.S. 306, 313 (1952). In the context of a Free Exercise case today, then, virtually anything goes. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. "Courts," we have been told, "should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.¹² The "religion" involved can be a religion even of one. See *Bowen*, 476

¹² Thus, in *Bowen*, which was predicated upon the plaintiff's "recently[-] developed . . . religious objection to obtaining a Social Security number for [his daughter] Little Bird of the Snow," 476 U.S. at 696 (emphasis added), the plaintiff Roy was permitted casually to change his religious views mid-trial when it was discovered that his daughter already had a Social Security number — apparently only then did it occur to Mr. Roy that Little Bird of the Snow's spirit would be "robbed" of its power only by the use of her Social Security number. *Id.* at 697.

U.S. at 696; see also *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). Thus, given the current unprecedented surge in immigration,¹³ and given that the great bulk of immigrants are coming from areas that traditionally have not shared the "Judeo-Christian" ethic,¹⁴ and given the virtually limitless capacity of the human spirit (or mind) for revelation (or improvisation and rationalization),¹⁵ religious claims *to act* which are contrary to our

¹³ See Margaret L. Usdansky, *Immigrant Tide Surges in '80s*, USA Today, May 29, 1992, at 1 ("The USA's largest 10-year wave of immigration in 200 years — almost 9 million people — arrived during the 1980s") (citing Census Bureau figures).

¹⁴ See Immigration & Naturalization Service, *1990 Statistical Yearbook* 50 (1991) (immigration from Asia, 1981-90: 2,738,157; Caribbean, 1981-90: 872,051; Europe, 1981-90: 761,550).

¹⁵ See, e.g., Larry Rohter, *Sect's Racketeering Trial Is Set To Open*, N.Y. Times, Jan. 6, 1992, at A14 (discussing allegations that Yahweh ben Yahweh, leader of Temple of Love, Nation of Yahweh, and The Brotherhood, required his inner circle to kill "white devils" and present to him their severed ears as proof of the deed); Larry Rohter, *Sect Leader Convicted On Conspiracy Charge*, N.Y. Times, May 28, 1992, at A16 (Yahweh ben Yahweh found guilty); Marjorie Miller & J. Michael Kennedy, *Mexico Massacre: Potent Mix of Ritual and Charisma*, L.A. Times, May 16, 1989, at 1 (discussing human sacrifice of University of Texas student, Mark Kilroy of Sante Fe, by marijuana-smuggling practitioners of Palo Mayombe in Matamoros, Mexico); John Huxley, *Sex-Cult Children Held*, Sunday Times (London), May 17, 1992 (sexual and psychological abuse of children sanctioned by Children of God religious sect); *Religion Based on Sex Gets a Judicial Review*, N.Y. Times, May 2, 1990, at A17 (federal district judge considers whether to halt state prosecution for prostitution by priestess of Church of the Most High Goddess; church, based on "absolution" through sex and "sacrifice" through payment of money, worships Egyptian goddess of fertility, Isis; priestesses must have sexual relations with 1,000 men before qualifying for priesthood); Anthony Flint, *Paganism Seeing a Resurgence*, Boston Globe, Apr. 27, 1992, at 1 (Metro/Region Section) (Paganism is "a confluence of people looking for alternatives," quoting codirector of The
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essentially Western law¹⁶ will inevitably proliferate on a grand scale. This tide of "religiosity" will only augment the already-taxed relations between religious claimants and our enlarged 20th century governments. See *Bowen*, 476 U.S. at 707, 707 n.17; *Thomas*, 450 U.S. at 721 (REHNQUIST, J., concurring in part and dissenting in part). And while "[t]he rise of the welfare state" should not spell the decline of the Free Exercise Clause, *Bowen*, 476 U.S. at 732 (O'CONNOR, J., concurring in part and dissenting in part), still, the increase in the scope and number of religious claims *to do* contrary to law should not be allowed to *un-do* the legitimate ends of civilization.

For these reasons *amici* propose that the compelling state interest test be abandoned in cases involving Free Exercise *action*

¹⁶(...continued from preceeding page)

EarthSpirit Community); *Exempt Organizations—Charitable Contributions Made to Venusian Church Disallowed*, Daily Report for Executives, Mar. 13, 1987, at H-12 (discussing Venusian Church that runs adult pornographic film booths and live sex shows); *Women Break 107-Day Fast After Learning of Parole*, AP, Dec. 3, 1987, available in LEXIS, Nexis Library, AP File (religious sect called Sons of Freedom Doukhobors believes in public nudity and burning material possessions); *Renegade Mormons*, Newsweek, Jan. 20, 1975, at 72 (violent sect practicing polygamy in Mexican commune as Church of the First Born in the Fullness); Peg McEntee, *Polygamy Endures a Century After Mormon Church Rejects It*, AP, May 19, 1990, available in LEXIS, Nexis Library, AP File (5,000 polygamists living in western states under Church of Apostolic United Brethren).

¹⁶ But see *Lyng*, 485 U.S. at 473, 474 (BRENNAN, J., dissenting) (suggesting that Western concepts of land, centered around notions of ownership and use of private property, be balanced against those of Native Americans "in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred"). Interestingly, this issue was raised at trial when petitioner Pichardo accused counsel for respondent of "applying western logic to a religion which is not western." (R729) "Mr. Pichardo," said the late District Judge Spellman, "so you understand, we're applying western law as well." (R730)

claims (if indeed it has ever truly been applied outside of the unemployment benefits context of *Sherbert, Thomas, and Hobbie*, see *Lee*, 455 U.S. at 263 n.3 (STEVENS, J., concurring)).¹⁷ However, in urging the Court to abandon in Free Exercise *action* cases the most stringent test to have emerged from the Equal Protection Clause, *amici* do not suggest that the Equal Protection Clause's lowest test, "rational relation," be adopted. Cf. *Bowen*, 476 U.S. at 727 (O'CONNOR, J., concurring in part and dissenting in part). That test would not accord Free Exercise the obviously heightened protection that it deserves, and for this reason *amici* also respectfully suggest that the "general law" formulation of *Smith II* is flawed as well. On the one hand, the general law test is too susceptible to legislative legerdemain. Under it, too much depends on legislative craft and not enough on evaluating the government's interest and intent as juxtaposed against the religious claim. Thus, in this case, for instance, under the exact same circumstances as obtained when the challenged ordinance(s) was enacted, the City of Hialeah could have promulgated a law stating: "No one, except licensed commercial purveyors of food for human consumption, may possess live turtles, fowl, goats, sheep, and other livestock." Had this ordinance been passed, *certiorari* probably would never have been granted. Indeed, under the general law test, the validity of such an ordinance would have been definitively and quickly disposed of in the lower court(s); Hialeah's interests and intent in passing the ordinance would have remained unscrutinized — even though the law would still have been promulgated precisely *because of* petitioners' announced intention

¹⁷ Yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases is that by purporting to set the water mark so very high, while simultaneously realizing that such a standard is very hard to meet and intuitively sensing that it is an impossible burden in a religiously-pluralistic ordered society, courts are constrained to hold proffered state interests to be "compelling," even though, truly, they are important and legitimate at best. The compelling state interest test is thus dangerously devalued as a tool against repression in the contexts of race and speech.

to open up a Santerian church. (A22, A28) But because Hialeah's drafting was a bit more specific and forthrightly declared that the City was appalled by the ritual or ceremonial killing of animals not primarily for the purpose of food consumption, this Court's attention was engaged and Hialeah now bears the burden of arguing compelling interests (even though, in the opinions of *amici*, the ordinances, truly, are general¹⁸). Thus, in addition to being *under*-protective of religious claims to conduct, the general law formulation is *over*-protective as well by leaving legislatures no operating latitude to target antisocial action when religious practitioners are the only ones currently interested in committing the act. Cf. *Dawson v. Delaware*, 112 S. Ct. 1093, 1102 (1992) (THOMAS, J., dissenting) ("Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial").

Amici support *heightened* scrutiny as the proper test for religious claims to act contrary to law, a test familiar from, and similar to, the intermediate level of Equal Protection analysis. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Clark v. Jeter*, 486 U.S. 456 (1988); *City of Cleburne v. Cleburne*

¹⁸ The ordinances were truly general, of course, because they applied to both religious and non-religious ritual or ceremonial killings of animals not for the primary purposes of food. They would, for instance, penalize the action of college students who, in a drunken spree, ceremonially hack to death a beached dolphin in homage to "The God of Spring Break," and arguably would prohibit tradition-laden English-style fox hunting. Moreover, unlike the law in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), the ordinances at issue here are applicable *everywhere* in Hialeah. Cf. *id.* at 2472 (WHITE, J., dissenting). *Amici* wish to make clear that they agree with respondent that the ordinances are general laws and, in the alternative, that they are supported by compelling interests. *Amici* approach the case from a different perspective, however, because we believe in the correctness of the arguments set forth herein, and because by presenting them we hope to perform a service by laying before the Court "relevant matter . . . that has not already been brought to its attention . . ." See Sup. Ct. R. 37.1.

Living Center, 473 U.S. 432 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). Under this test, laws supported by important and legitimate governmental interests would survive religious claims to act contrary to them. Cf. *Bowen*, 476 U.S. at 709 ("The Social Security number requirement clearly promotes a legitimate and important public interest").¹⁹ In this case, the interests of Hialeah are undoubtedly *important*. Prevention of cruelty to animals has long been recognized as well within the states' police power to safeguard the health, safety, welfare, and morals of its citizens. See *People v. Reed*, 176 Cal. Rptr. 98,103 (App. Dep't Super. Ct. L.A. County 1981); *Bland v. People*, 76 P. 359, 360-61 (Colo. 1904); *Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (1908); *C.E. America, Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968); *Hargrove v. State*, 321 S.E.2d 104, 108 (Ga. 1984); *State v. Abellano*, 441 P.2d 333, 340 (Haw. 1968); *Illinois Gamefowl Breeders Ass'n v. Block*, 389 N.E.2d 529, 532 (Ill. 1979); *State v. Karstendiek*, 22 So. 845, 846-47 (La. 1897); *State v. Starkey*, 90 A. 431, 432, 433 (Me. 1914); *Commonwealth v. Higgins*, 178 N.E. 536, 537 (Mass. 1931); *City of St. Louis v. Schoenbusch*, 8 S.W. 791, 792 (Mo. 1888); *State v. Prince*, 94 A. 966, 966 (N.H. 1915); *State v. Davis*, 61 A. 2, 4 (N.J. Super. Ct. 1905), *aff'd*, 64

¹⁹ And under this test, the real-life parade of general-law horrors that is set forth in the brief of *Amici Americans United For Separation of Church and State, et al.* at 19-24, arguably would be avoided. For instance, the generally important governmental interest in having autopsies performed in all cases involving an unnatural death arguably is not present, and thus is not legitimate, when the case involves an Conservative Jew who is killed in a car accident. And the view of the City of New York, that it is better for the homeless to sleep in the street rather than in a homeless shelter without an elevator, arguably fails to produce a governmental interest important enough to trump the religiously-inspired charitable activity of Mother Teresa's sisters. Heightened scrutiny would help eliminate the cases where appalling results are reached due to the general law formulation's failure to examine the importance and legitimacy of the governmental interests involved.

A. 1134 (1906); *Barrett v. State*, 116 N.E. 99, 101 (N.Y. 1917); *State v. Longhorn World Championship Rodeo, Inc.*, 483 N.E.2d 196, 200, 201 (Ohio Ct. App. 1985); *Kuchler v. Weaver*, 100 P. 915, 921-22 (Okla. 1909); *Commonwealth v. Bonadio*, 415 A.2d 47, 49 (Pa. 1980); *State v. Tabor*, 678 S.W.2d 45, 48 (Tenn. 1984); *Cinadr v. State*, 300 S.W. 64, 65 (Tex. Crim. App. 1927); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah) *cert. denied*, 436 U.S. 927 (1978); *Anderson v. George*, 233 S.E.2d 407, 410 (W. Va. 1977).²⁰ And the primary reason for statutes banning cruelty to

²⁰ Indeed, all fifty states have laws protecting animals. See Ala. Code § 13A-11-14 (1982); Alaska Stat. § 11.61.140 (1989); Ariz. Rev. Stat. Ann. § 13-2910 (1956); Ark. Code Ann. § 5-62-101 (Michie 1987); Cal. Penal Code § 597 (West Supp. 1992); Colo. Rev. Stat. § 18-9-202 (1986 & Supp. 1991); Conn. Gen. Stat. § 53-247 (Supp. 1992); Del. Code Ann. tit. 11, § 1325 (1974 & Supp. 1990); D.C. Code Ann. § 22-801 & 802 (1981); Fla. Stat. ch. 828.12 (1976); Ga. Code Ann. § 16-12-4 (Michie 1988); Haw. Rev. Stat. § 711-1109 (Supp. 1991); Idaho Code § 18-2102 (1987); Ill. Ann. Stat. ch. 8, para. 703.01 (Smith-Hurd Supp. 1992); Ind. Code Ann. § 35-46-3-12 (Supp. 1991); Iowa Code Ann. § 717.2 (Supp. 1992); Kan. Stat. Ann. § 21-4310 (Supp. 1992); Ky. Rev. Stat. Ann. § 525.130 (1990); La. Rev. Stat. Ann. § 14:102 (West 1986 & Supp. 1992); Me. Rev. Stat. Ann. tit 7, § 4011 (West 1964); Md. Code Ann. § 27:59 (1992); Mass. Gen. L. ch. 272, § 77 (1990); Mich. Comp. Laws § 752.21 (1991); Minn. Stat. § 343.21 (1990); Miss. Code Ann. § 97-41-1 (1972); Mo. Ann. Stat. § 578.012 (Vernon Supp. 1992); Mont. Code Ann. § 45-8-211 (1991); Neb. Rev. Stat. § 28-1002 (1989); Nev. Rev. Stat. Ann. § 574.100 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 644:8 (1986 & Supp. 1991); N.J. Stat. Ann. § 4:22-26 (West Supp. 1991); N.M. Stat. Ann. § 30-18-1 (Michie 1978); N.Y. Agric. & Mkts. Law § 353 (McKinney 1991); N.C. Gen. Stat. § 14-360 (Supp. 1991); N.D. Cent. Code § 36-21.1-02 (1987 & Supp. 1989); Ohio Rev. Code Ann. § 959.13 (Anderson 1988); Okla. Stat. Ann. tit. 21, § 1685 (West 1983); Or. Rev. Stat. § 167.315-.330 (1991); 18 Pa. Cons. Stat. Ann. § 5511 (Supp. 1992); R.I. Gen. Laws § 4-1-2 & 3 (1987); S.C. Code Ann. § 47-1-40 (Law. Co-op. Supp. 1991); S.D. Codified Laws Ann. § 40-1-2 (1985); Tenn. Code Ann. § 39-14-202 (1991); Tex. Penal Code Ann. § 42.11 (West 1989 & Supp. 1992); Utah Code Ann. § 76-9-301 (Supp.

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animals — the protection of public morals — highlights the importance of yet another of Hialeah's interests, *i.e.*, shielding children from scenes of cruelty. *See Higgins*, 178 N.E. at 538 (“[statute] directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe”); *Bland*, 76 P. at 361 (“seeing frequently the mutilated and disfigured animals sears the conscience and hardens the minds of the people”); *Johnson*, 30 App. D.C. at 522 (“Cruel treatment of helpless animals . . . arouses the . . . indignation of every person possessed of human instincts”); *C.E. America, Inc.*, 210 So.2d at 446 (observing bloody bulls “shocks the sensibilities of any person possessed of humane instincts”); *Stephens v. State*, 3 So. 458, 459 (Miss. 1888) (“cruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men”); *Schoenbusch*, 8 S.W. at 792 (stating that prevention of cruelty to animals is for protection of general welfare); *Prince*, 94 A. at 966 (noting that cruelty to animal statute “calculated to prevent a prevalent evil and to promote the welfare of society”); *Barrett*, 116 N.E. at 101 (protecting animals guards moral and spiritual needs of citizens); *State v. Porter*, 16 S.E. 915, 916 (N.C. 1893) (“[statute] enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt”); *Kuchler*, 100 P. at 922 (regulating slaughter relates to public morals); *Peck*, 574 P.2d at 369 (legislating against animal fighting

²⁰(...continued from preceeding page)

1991); Vt. St. Ann., tit. 13, § 352 (Supp. 1991); Va. Code Ann. § 3.1-796.122 (Michie Supp. 1991); Wash. Rev. Code Ann. § 16.52.070 (West 1992); W. Va. Code § 61-8-19 (Supp. 1991); Wis. Stat. Ann. § 951.02 (West Supp. 1991); Wyo. Stat. § 6-3-203 (1977). The following states, like Florida and Hialeah, forbid the “unnecessary,” “needless,” “unjustifiable” or “undue” suffering of animals: California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

“is justified for the purpose of regulating morals”); *see also Prince*, 321 U.S. at 166 (The state’s “authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience”); *Jehovah’s Witnesses*, 390 U.S. at 598. Finally, Hialeah’s interest in protecting its citizens from disease-fostering animal carcasses need only be stated to establish its importance. *Cf. Prince*, 321 U.S. at 166-67 (“The right to practice religion freely does not include liberty to expose the community . . . to communicable disease”).

The *legitimacy* of Hialeah’s interests is established in several ways. First, the interests are legitimate in the sense that they are *actually present* in this case; on the basis of wholly credible expert testimony the district court found this *as a matter of fact, and the court of appeals affirmed this finding. Cf. Tony & Susan Alamo Found.*, 471 U.S. at 299 (factual questions resolved against petitioners by both courts below are barred from review in this Court absent the most exceptional circumstances).²¹ The interests are also legitimate in that making an exception for the petitioners (who aver that they will dispose of carcasses in a hygienic fashion) would abuse the cruelty-to-animals and protection-of-children interests, and would undoubtedly raise charges of favoritism from the many other sects in the area that practice exposed animal sacrifice. (A47) *Cf. O’Lone*, 482 U.S. at 353; *Goldman*, 475 U.S. at 512-13 (STEVENS, J., concurring); *Lee*, 455 U.S. at 263 n.2 (STEVENS, J., concurring).²² Finally, the ordinances are legitimate

²¹ While not relying on them, the court of appeals left undisturbed the district court’s findings of fact regarding the adverse psychological effects upon children of witnessing animal carnage.

Interestingly, even petitioners admitted at trial that the health risks associated with the “putrefactive decomposition” (R364) of exposed animal sacrifices were “a legitimate concern.” (T41)

²² The appearance of favoritism also presents yet another reason for abandoning the compelling state interest test in Free Exercise *action* cases. For given the nature of things, no one thinks that government is favoring
(continued on next page...)

because they were not passed with "an intent to discriminate against particular religious beliefs or against religion in general." See *Bowen*, 476 U.S. at 707. The district court found as a matter of fact (which the court of appeals affirmed), that when Hialeah passed the ordinances it did not have an intent to suppress Santeria, though it did want to stop animal sacrifice by whomsoever it was practiced. (A28) This finding was amply demonstrated by the record, most tellingly, however, by the fact that Hialeah granted petitioners a certificate of occupancy, permitting them to open their doors and operate as a church — all they could not do was sacrifice animals. See also Kimberly C. Moore, *Supreme Court to Hear Florida Animal Sacrifice Case*, States News Service, Mar. 23, 1992, available in LEXIS, Nexis Library, Omni File ("We don't have a problem with anyone's religion," said Julio Martinez, the mayor of Hialeah and also a proponent of outlawing the animal sacrifices. 'Animal Sacrifices don't belong in this country in this century'); A.J. Dickerson, *Secretive Religion Makes Waves in South Florida*, AP, June 7, 1987, available in LEXIS, Nexis Library, Omni File ("People oppose it absolutely," said Councilman Salvatore D'Angelo. 'I respect all religions but I am opposed to the ritual of live animal sacrifice').²³ Cf. *Barnes*

²²(...continued from preceeding page)

particular religious sects when it countenances the mere profession and propagation of those beliefs. But when government stands idly by as persons *act in and upon* the real world in the name of religion, permitting behavior that the enlightened sensibilities of society have long and rightly viewed as antisocial, the impression inevitably arises that government is favoring one group at the expense of all others.

²³ Petitioners make much of the "mob" atmosphere at the city council meeting during the time that the ordinances were passed. It is interesting to note at what point, however, the crowd got truly mob-like: "About 300 people turned out at a council meeting June 9 demanding that the city [of Hialeah] stop the opening of south Florida's first Santeria church," *Butterworth to Decide on Santeria Animal Sacrifice*, UPI, June 15, 1987, available in LEXIS, Nexis Library, UPI File (emphasis added) — "[the] (continued on next page...)"

v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (state intended to suppress public nudity, not erotic expression); *United States v. O'Brien*, 391 U.S. 367 (1968) (government intended to suppress destruction of draft cards, not expressive burning of them).

Which raises yet another, final, interest of Hialeah, one that is obviously legitimate and important. Having had the surrounding area for some time dotted with the remains of animals in streets, parks, and cemeteries,²⁴ the announcement of the church's imminent opening placed the subject of animal sacrifice squarely before the city council and it *rightly* recoiled in disgust. *Not* because it disagreed with the *teachings* of Santeria, or with what its adherents *believed*. These it was quite prepared to have disseminated throughout Hialeah via the church, viewing them, apparently, as perhaps odious but nonetheless harmless ignorance. No, the City Council of Hialeah recoiled in disgust at, and acted affirmatively to prevent, *animal sacrifice* because it is, in a word,

²³(...continued from preceeding page)

furious crowd booed, hissed and jeered city attorneys who told City Council it could not legally stop a religion that sacrifices animals from opening its first public church in Florida," A.J. Dickerson, *Lawyers Jeered for Their Advice on Closing Church*, AP, June 10, 1987, available in LEXIS, Nexis Library, AP File (emphasis added). Thus, despite strong political pressure to the contrary, the City Council of Hialeah bowed to its constitutional obligations, and permitted the church to open. This is the political process in action, the principal means by which minority religions may be protected. See *Smith II*, 494 U.S. at 890.

²⁴ See Jeffrey Schamlz, *Hialeah Journal; Animal Sacrifices: Faith Or Cruelty?*, N.Y. Times, Aug. 17, 1989, at A16; A.J. Dickerson, *Secretive Religion Makes Waves In South Florida*, AP, June 7, 1987, available in LEXIS, Nexis Library, Omni File ("They drop it over the fence or they leave it on a grave. Every day we send an employee to clean up. We throw away the dead animals," said Fred Cruz, a sales manager at Graceland Memorial Park").

barbaric, and is, as a secular matter, deemed to be immoral.²⁵ On several occasions this Court has declared that government may legislate against a return to barbarism. In *Mormon Church*, noting that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism," 136 U.S. at 49, the Court held that "[t]he State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised," *id.* at 50. And in *Cleveland*, after quoting *Mormon Church*, see *Cleveland*, 329 U.S. at 19, the Court wrote that "[w]hether an act is immoral within the meaning of the statute, is not to be determined by the accused's concepts of morality." *Id.* at 20. Thus, while the enlightened sensibilities of our society unanimously and rightly condemn the *unnecessary* killing of animals, *amici* recognize that, regrettably, in this culture it is generally accepted that *the* primary purpose for the animals which petitioners wish to sacrifice is to provide food for the sustenance of humankind. It was, therefore, well within the bounds of civilized judgment for Hialeah to make the *secular* determination that the killing of these animals *not* for the primary purpose of consumption is "unnecessary" and thus immoral. Because we are civilized we must permit the profession and propagation of any belief whatsoever; but we are not yet so "civilized" that barbarism must be countenanced, irrespective of the reason advanced for its practice.

²⁵ And make no mistake: for though this case *does* involve a clash of cultures, it does *not* present a "white" *versus* "black" or "white" *versus* "brown" scenario. Hialeah has a population of approximately 174,000 — 86% of which is Hispanic. D&B Donnelly Demographics, July 29, 1992, available in DIALOG, File No. 575. Cuban emigres and their progeny, then, are hardly outnumbered in Hialeah. Indeed, at the time the instant ordinances were enacted, the City of Hialeah was governed by its mayor, Raul L. Martinez, and city counsel members Cardoso, D'Angelo, Ehevarria, J. Martinez, Mejides, and Robinson. What this case *does* present, however, is the struggle of Western Civilization *versus* . . . something else.

CONCLUSION

The day is passed when America could be parochially described as strictly a "Christian Nation." It may be, moreover, that we are no longer strictly even a "religious" people — at least not in the traditional sense of established faith. But the United States is — still, at least — a Western nation, one that proceeds from the very best that Western Civilization has to offer, including limited government, due process, trial by jury, and, most assuredly, religious tolerance. Regarding the latter, government must therefore be utterly tolerant of religious beliefs and the peaceable profession and propagation of such beliefs, no matter how barbaric or misguided those beliefs may seem to any number of people. This is the "marketplace of ideas," religious and otherwise. But in this free yet civilized society of ours, neither the federal government, nor the states, nor the City of Hialeah is required to tolerate rampant primitivism in the name of religion. For while governments may choose to accommodate, nevertheless they may also choose to forbid non-expressive religious *action* when it is contrary to important and legitimate interests within their spheres of power. The prevention of cruelty to animals, the preservation of children from the dulling of their humane sensibilities through witness to carnage, the protection of the citizenry from disease-fostering rotting carrion, and the securing of society against a return to barbarism — all are governmental interests of high and time-honored importance, and all are genuinely present in this case. Because of this, and because the City of Hialeah, Florida, acted to safeguard these interests without

discriminatory intent, the judgment of the court of appeals, upholding that of the district court, should be affirmed.

Dated: New York, New York
July 31, 1992

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JUL 31 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC.,

—and—

ERNESTO PICHARDO,

Petitioners,

—against—

CITY OF HIALEAH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF AMICUS CURIAE OF INSTITUTE FOR ANIMAL RIGHTS
LAW, AMERICAN FUND FOR ALTERNATIVES TO ANIMAL
RESEARCH, FARM SANCTUARY, JEWS FOR ANIMAL RIGHTS,
UNITED ANIMAL NATIONS, and UNITED POULTRY
CONCERNS, IN SUPPORT OF RESPONDENT
CITY OF HIALEAH, FLORIDA**

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INTERESTS OF AMICI CURIAE¹

Institute for Animal Rights Law, a New York charitable trust, was created for the purpose of advancing the rights of animals. Its programs include an active *pro bono amicus curiae* effort on its own behalf and on behalf of other animal rights and animal welfare organizations. By addressing important legal issues affecting the well being of animals, it is able to further its mission of seeking to eliminate cruelty to, and other abuses of, animals.

American Fund for Alternatives to Animal Research devotes the main focus of its energy to giving financial assistance to scientists to develop, validate, and teach non-animal means of research and testing. It also supports other means to reduce the suffering of animals.

Farm Sanctuary is a national, non-profit organization representing approximately 10,000 members throughout the United States. The organization was formed in 1986 to address the serious animal abuse problems associated with "food animal" production. Among its various educative, legislative, and investigative programs, Farm Sanctuary operates a 175-acre working farm shelter for victims of animal agriculture.

Jews for Animal Rights, founded in 1985, seeks to raise the consciousness of the Jewish community about animal abuse. Judaism has a very long tradition of ethical concern for animals. This tradition is commonly called "tsa'ar ba'alei chaim," or "remember the pain of living creatures." This is the organization's motto, and the organization's goal is to make this millennially-old Jewish value a contemporary moral issue through promoting vegetarianism and by seeking to influence the animal-related decisions of Jewish organizations, rabbis, and Jewish action groups.

United Animal Nations, U.S.A. Chapter ("UAN-USA") serves to promote unity within the animal protection movement; to

¹ *Amici* file this brief with permission of respondent; we understand that the blanket consent of petitioners has been filed with the Clerk of this Court.

coordinate, but never to compete. It convenes a General Assembly for organizations and individuals dedicated to humane treatment for animals; fund projects and supports local or specialized organizations and individuals working on behalf of animals; participates in and orchestrates national protest events; and puts animal exploiters "on trial" to encourage pressure against them. UAN-USA has also created an Emergency Animal Rescue Service to provide assistance to animals, wild or domestic, in times of great need or disaster, whether manmade or natural. Since the creation of UAN-USA in 1985, 41 organizations have joined it in support of unified efforts for animals.

United Poultry Concerns is a non-profit organization which addresses the use of domestic fowl in food production, science, education, and entertainment. It seeks to make the public aware of the ways domestic fowl are used in this society and elsewhere in the world. It promotes the respectful and companionable, non-exploitive view and treatment of these birds, holding that the production and keeping of them for food and other utilitarian purposes is inherently inhumane, not only because of the physical pain and suffering involved, but because it humiliates their dignity, encourages human smugness towards the rest of life, and sustains a psychological atmosphere that is demeaning and deficient.

SUMMARY OF ARGUMENT

A host of justiciability problems, either singly or in combination, plague this suit. As the ordinances challenged here constitutionally have never been enforced, and as petitioners' applications to sacrifice animals remain pending even today, the case is not ripe. Moreover, other laws which petitioners have not challenged would nevertheless prevent them from sacrificing animals even if petitioners prevail before this Court. The ultimate problem they face (an alleged inability to sacrifice) will not be redressed by a favorable decision and therefore petitioners lack standing. In addition, as petitioners no longer wish to sacrifice animals at the current site of the church, the case has become moot. Because resolution of the constitutional issues depends upon

an initial construction of state law upon which the state courts have not yet passed, the district court ought to have abstained. And finally, because the essence of petitioners' as-applied constitutional challenge has always been that respondent passed the ordinances with the express intention of chilling the free exercise of their religion, since the district court found as a fact that respondent had no such intent, nothing remains of the case to review but that factual determination — which the court of appeals affirmed. Accordingly, the Court should dismiss the writ of *certiorari* as having been improvidently granted.

ARGUMENT

I.

STATUTORY/PROCEDURAL ANALYSIS

Before this Court can properly exercise its Article III powers of review, and because *amici* have noted in other of the briefs submitted here a less-than-perfect grasp of exactly what the City of Hialeah actually did, the Court must be presented with a clear statement of which statutes are (and are *not*) involved here; what these statutes do (and do *not*) provide; which statutes petitioners actually challenged (and which they did *not*); and what the district court and the court appeals decided (and what they did *not*).²

Beginning in June of 1987, in response to petitioners' announcement that the Church of the Lukumi Babalu Aye, Inc., at its *first* church site, intended "to function as an established Santeria

² As the Court is acquainted with the facts from the presentations of others, those facts are recited herein only to the extent they are necessary to carry the argument. References to the Trial Record are denominated "(R___)"; references to the Transcript of Oral Argument after Trial are denominated "(T___)"; references to the Appendix to the Petition for Certiorari are denominated "(A___)"; and references to the Joint Appendix are denominated "(JA___)".

church[,] . . . perform[ing] all of the religious rituals of Santeria, including animal sacrifice," (A22) the Hialeah City Council passed several ordinances (A22, A28):³

City of Hialeah Ordinance No. 87-40 (June 9, 1987), promulgated due to "concern over the potential for animal sacrifices being conducted in the City of Hialeah," incorporated by reference Florida Statute, Chapter 828. (A52, A56) Of particular note to this case, Fla. Stat. § 828.12(1), entitled "Cruelty to Animals" makes it a misdemeanor to "unnecessarily . . . kill[] any animal" (A56)⁴ Thus, by Florida state statute *and* by City of Hialeah ordinance, the "unnecessary killing of animals" was forbidden. It still is.

City of Hialeah Ordinance No. 87-52 (Sept. 8, 1987), though certainly not a model of clarity, recites that it was enacted because of "concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah." (A52-53) This ordinance established the following: i) it forbade the ownership, possession, slaughter, or sacrifice of animals by persons "intending to use such animal for food purposes" *and* by groups or individuals that "sacrifice[] animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed" (A53); ii) it defined "sacrifice" to mean "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption" (A52); and iii) it made clear that the slaughter of animals for food purposes by properly licensed and zoned establishments was not prohibited. (A53)

³ The City Council at that time consisted of members Cardoso, D'Angelo, Ehevarria, J. Martinez, Mejides, and Robinson; the Mayor was Raul L. Martinez.

⁴ *Per* Fla. Stat. § 828.27(6), Hialeah did not adopt the penalty provisions of § 828.12, but instead provided for punishment by fine not to exceed \$500 and/or a jail term of 60 days. The Florida state statute provides for a fine of not more than \$5,000 and/or a jail term of not more than one year. *See* Fla. Stat. §§ 828.12(1), 775.082.

City of Hialeah Ordinance No. 87-71 (Sept. 22, 1987), which recites that "the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community" (A53), adopted the same definition of "sacrifice" as Ordinance No. 87-52 (A53), and provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." (A54)

Finally, *City of Hialeah Ordinance No. 87-72* (Sept. 22, 1987), which recites that "the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare" (A54), defined "slaughter" as "the killing of animals for food" (A54), and provided that only properly licensed and zoned slaughterhouses could slaughter animals within the city limits of Hialeah. (A54)

In addition to this statutory scheme, an opinion by the Attorney General of Florida was issued shortly after the promulgation of Ordinance No. 87-40. The Opinion, rendered in response to an inquiry by the City Attorney of Hialeah, advised the City that "the sacrificial killing of animals other than for food consumption" came within the state statutory language proscribing the "unnecessary killing" of an animal and was therefore "prohibited by s. 828.12." Atty. Gen. Op. 87-56 (July 13, 1987).

In sum, as a result of the laws, ordinances, and Opinion referred to above, in Hialeah itself *and* in Florida as a whole, *no one was allowed to kill an animal in a ritual or ceremony not for the primary purpose of food consumption; and in Hialeah, only properly licensed and zoned slaughterhouses could kill animals for food.* This case, to the extent that it is about anything at all, is about only that.

Further facts are necessary to illuminate what *is* (and is *not*) at issue in this case:

On August 7, 1987, Hialeah granted the Church of the Lukumi Babalu, Inc. a certificate of occupancy to operate a church on its premises. (A26) Two years later, on July 10, 1989 (just prior

to the trial of this action), petitioners applied for a slaughterhouse occupational license; petitioners also applied for zoning authorization to operate their premises as a slaughterhouse. As petitioners subsequently explained to the district court at trial, "we were told by an assistant city attorney that we could do what we're in this lawsuit about if we file the proper licensing application which we have done." (R87) Petitioners' applications, however, have been held in abeyance pending the outcome of this litigation. (A25) *Thus, at no time were any of the Hialeah ordinances set forth above actually applied to petitioners* — no one has ever been fined, and no one has ever been jailed for disobeying the ordinances by improperly sacrificing or slaughtering animals in Hialeah. (A29; R149) Petitioners do not contend otherwise.

On September 25, 1987, petitioners filed a complaint in the District Court for the Southern District of Florida alleging, pursuant to 42 U.S.C. § 1983, that respondent had violated their First Amendment rights as secured by the Fourteenth Amendment. Their § 1983 suit was predicated upon a claim that agents of Hialeah had purposely harassed them because of their religion. Petitioners alleged that they had been discriminatorily harassed by respondent during the licensing and inspection process which the Church had to go through before it opened, but this claim was rejected by the district court's findings of fact. This determination was affirmed by the court of appeals, and was not raised by the petition for *certiorari*. Petitioners also sought a declaratory judgment that the ordinances prohibiting sacrifice were unconstitutional, alleging that they had been passed with the intent to chill petitioners' Free Exercise rights. Petitioners did *not* in any way challenge the state law, § 828.12(1), which forbade the "unnecessary killing of animals" (A3, A29, A49); and they did *not* mount a constitutional challenge against the ordinances insofar as they restricted the slaughter of animals to properly licensed and zoned slaughterhouses. (A23, A29)

In July and August of 1989, a nine-day bench trial was held. In a Memorandum Opinion, dated October 5, 1989, the district court awarded judgment in favor of respondent, finding that it had not violated petitioners' constitutional rights. Preliminarily,

however, the court made several crucial findings of fact and law. It held, *as a matter of law*:

- that even if the challenged ordinances were invalid, petitioners "would still be prohibited from performing ritual sacrifices under § 828.12 of the Florida Statutes. *See* Opinion Attorney General 87-56 (1987)" (A29);
- that there were, moreover, "several provisions of the Hialeah City Code that would apply" to prohibit ritual animal sacrifice "including zoning provisions . . . and licensing provisions" (A29);
- that "at no time have [petitioners] raised any free exercise challenge addressed toward the validity of [the] slaughterhouse regulations . . ." (A29; *see also* A23);
- that petitioners "cannot maintain a facial challenge to the ordinances" (A41); and
- that petitioners' only remaining constitutional claim going to the ordinances was an as-applied claim that they "were passed *because of the council members' intent* to discriminate against the Church and to keep the Church from establishing a physical presence within the City," (A28) (emphasis added), *i.e.*, "that the passage of the ordinances *was intended* to force the Church out of Hialeah, and to chill the religious freedom of Santeria practitioners by imposing criminal sanctions on practices that are an integral part of that religion." (A29)

None of these determinations of law were disturbed by the court of appeals — which, of course, affirmed the judgment of the district court — and *none* of these legal determinations were challenged in the petition for *certiorari*.

Thus, since Ordinance No. 87-40 ("unnecessary killing") was redundant in light of Fla. Stat. § 828.12(1), which was not challenged; and since Ordinance No. 87-72 (slaughterhouses) also was not constitutionally challenged; and since Ordinance No. 87-52 (no possession of animals intended to be sacrificed) was subsumed under Ordinance No. 87-71, petitioners' remaining entire case came down only to this:

- 1) an "as applied" constitutional challenge,
- 2) to the City's alleged discriminatory intent,
- 3) to "chill" the alleged free exercise right of petitioners,
- 4) to "sacrifice," *i.e.*, to unnecessarily kill an animal in a ritual or ceremony not for the primary purpose of food consumption,
- 5) by promulgating anti-sacrifice Ordinance No. 87-71.

This limited challenge is extremely significant in light of the district court having found, *as a matter of fact*, that there was "no evidence" to establish petitioners' contention that the ordinances had been passed with discriminatory intent (A28) — that petitioners' "allegations of discrimination by the City are not supported by the facts" (A49) — that "there was no proof of any discriminatory action by the City against the . . . Church or any of its practitioners." (A49) To the contrary, the court found that the trial evidence established that

"the council members' intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals, including animal sacrifice, the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." (A28)

In affirming the judgment of the district court, the court of appeals expressly left the trial court's determinations undisturbed, noting that "[t]he district court made extensive findings of fact . . . , and no party argues that the record does not support these findings." (A2) Indeed, as *none* of the district court's findings of fact were even challenged by petitioners in the court of appeals, they therefore have not been raised in the questions presented upon which *certiorari* was granted.

II.

NONJUSTICIABILITY

It is the position of *amici* that this could not be a worse case to serve as the vehicle for what could become an extremely important Free Exercise precedent. Respectfully, *amici* believe that this case's foundation is built on sand. It is, in *amici's* opinion, rife with justiciability problems which strongly counsel the Court to dismiss the writ of *certiorari* as improvidently granted.

A. Ripeness

First, the case is not ripe. See *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2306 n.13 (1991) (ripeness relates to court's jurisdiction under Article III, and court must consider it on its own initiative).⁵ As already indicated *supra* at 6, the ordinances at issue have never been applied to *anyone*, let alone to the petitioners. This means that, especially after the district court's fact-finding and the court of appeals' affirmance, all that is left in this Court of petitioners' complaint is *a claim for an as-applied, allegedly intentional "chill."* However, not every plaintiff who merely alleges a First Amendment "chill" has thereby established the existence of a case or controversy, *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969) — something this Court expressly recognized in both *Laird v. Tatum*, 408 U.S. 1 (1972), and *Poe v. Ullman*, 367 U.S. 497 (1961). Indeed, in contrast to *every* Free Exercise (or even *arguably* Free Exercise) case that has preceded it in this Court, this case — where the ordinances at issue have never even been applied — is exceedingly unripe. By the time earlier cases were brought: George Reynolds had *already* been charged with and found guilty of bigamy, *Reynolds v. United States*, 98 U.S. 145 (1878); Samuel D. Davis

⁵ As the ordinances have severability clauses, petitioners must present a ripe claim as to each provision of each ordinance to permit them to mount an attack against the ordinances as a body. See *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

had *already* been indicted for and convicted of obstruction of justice for falsely taking an oath, *Davis v. Beason*, 133 U.S. 333 (1890); the United States had *already* brought suit against the Mormon Church seeking the dissolution of the church's charter and the escheat of much of its property, *Mormon Church v. United States*, 136 U.S. 1 (1890); the Compulsory Education Act of 1922 had *already* caused withdrawal from the Society of Sisters' schools of children who would have attended them with the result that the Sisters had experienced a steady decline of their income, and the state had proclaimed its intention to strictly enforce the statute, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); Hamilton and his schoolmates had *already* been suspended from the university for refusing to take the prescribed military training courses, *Hamilton v. Regents*, 293 U.S. 245 (1934); Schneider had *already* been charged, tried, and convicted of soliciting without a permit, *Schneider v. State*, 308 U.S. 147 (1939); and Newton Cantwell and his two sons also had *already* been charged, tried, and convicted, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); see also *Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); Sarah Prince had *already* been convicted for violating Massachusetts' child labor law, *Prince v. Massachusetts*, 321 U.S. 158 (1944); the Ballards had *already* been convicted for using and conspiring to use the mails to defraud, *United States v. Ballard*, 322 U.S. 78 (1944); Braunfeld was *already* about to go out of business because of application to him of the Sunday blue laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961); Torcaso had *already* been refused a commission as notary public, *Torcaso v. Watkins*, 367 U.S. 488 (1961); Sherbert had *already* been fired and then denied unemployment compensation benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); the children of Jehovah's Witnesses had *already* been administered blood transfusions against their parents' wishes, *Jehovah's*

Witnesses v. King County Hosp., 598 U.S. 390 (1968) (per curiam), *aff'g*, 278 F. Supp. 488 (D.D.C. 1967) (three-judge court); Gillette had *already* been convicted of wilfully failing to report for induction into the army, *Gillette v. United States*, 401 U.S. 437 (1971); Jonas Yoder, Wallace Miller, and Adin Yutzy had *already* been convicted of violating the compulsory school attendance law, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); Robison, who as a conscientious objector, had *already* performed alternate civilian service, and had therefore been denied the educational benefits accorded veterans of active service, *Johnson v. Robison*, 415 U.S. 361 (1974); George Maynard had *already* been convicted of knowingly obscuring the state motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705 (1977); McDaniel, the minister, had *already* been ousted from his position as a state constitutional convention delegate by the Tennessee Supreme Court, *McDaniel v. Pary*, 435 U.S. 618 (1978); Lee had *already* partially paid to the IRS assessed employment taxes which he claimed a religious right to withhold, *United States v. Lee*, 455 U.S. 252 (1982); the IRS had *already* revoked Bob Jones University's tax-exempt status, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); the Secretary of Labor had *already* filed an action against the Tony and Susan Alamo Foundation alleging a violation of minimum wage laws, *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); S. Simcha Goldman had *already* received a letter of reprimand, a negative recommendation, and was threatened with court-martial, *Goldman v. Weinberger*, 475 U.S. 503 (1986); Little Bird of the Snow's AFDC payments, medical benefits, and food stamps had *already* been cut off, *Bowen v. Roy*, 476 U.S. 693 (1986); access to Jumu'ah had *already* been eliminated for Shabazz, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); the Forest Service had *already* determined that it was going to build a road through sacred Indian grounds, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); the IRS had *already* disallowed deductions for Scientology "auditing" sessions, *Hernandez v. Commissioner*, 490 U.S. 680 (1989); and Alfred Smith and Galen Black had *already* been fired from their jobs as drug counselors for taking peyote and had been denied

unemployment benefits, *Smith v. Employment Div., Dept. of Human Resources*, 494 U.S. 872 (1990) (*Smith II*).

Even if the undisputed fact that the Hialeah ordinances were never applied to petitioners is not enough to show that this case is technically *unripe*, the foregoing cases demonstrate that this case must be the *least* ripe Free Exercise case *ever*, which by itself should give this Court pause. As the district court stated after trial: "There is no question that the evidence reveals that no effort was made by the church to in fact violate the ordinances so as to put that issue directly before this court on the basis of an unlawful arrest and challenging the constitutionality of the ordinance on that basis." (T24)

But there is more than that to petitioners' ripeness problem. Hanging in the air, still unresolved, are petitioners' applications for a license to slaughter and for a zoning variance to operate as a slaughterhouse. If these should be granted, petitioners will have the right to sacrifice animals in Hialeah *despite* the challenged ordinances, and petitioners' alleged Free Exercise rights will not at all be impeded. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng*, 485 U.S. at 445. Because this case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all, rendering constitutional adjudication premature, this dispute is *unripe*. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); see also *Bowen* 476 U.S. at 715 (BLACKMUN, J., concurring); *id.* at 717 (STEVENS, J., concurring). Moreover, not only are there serious ripeness problems in this case, but petitioners also lack standing.

B. Standing

The standing doctrine imposes limitations of constitutional dimension upon the federal courts. Constitutionally, a threshold in every federal case is whether the plaintiff has made out a "case or controversy" within the meaning of Article III. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). Specifically, the plaintiff

must show an injury to him or herself "that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); see also *Lujan*, 112 S. Ct. at 2136 (party invoking federal jurisdiction bears burden of proving, *inter alia*, redressability). Indeed, that likelihood must be "substantial." See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978). Without it, a federal court would not be the "last resort," and hearing the case would not be "a necessity." See *Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). Hearing this case is not "a necessity," and in fact would be "gratuitous," because petitioners cannot show a "substantial likelihood" that the relief they seek would flow from a favorable decision by this Court. See *Simon*, 426 U.S. at 38. While it is true that they "need not show that a favorable decision will relieve [their] every injury," *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original), petitioners fail to show potential relief from *any* alleged injury at all.⁶

Suppose that respondent's ordinances were found to be invalid. First, petitioners would still be prohibited from performing ritual sacrifices under unchallenged § 828.12 of the Florida Statutes, which Ordinance No. 87-40 incorporates (except as to punishment). (A29)⁷ Section 828.12, Fla. Stat., prohibits persons from "unnecessarily" killing any animal "in a cruel or inhumane manner." Such "killing," at least in the opinion of the Attorney General of the State of Florida, includes ritual sacrifice. See Atty. Gen. Op. 87-56 (July 13, 1987). And though no reported Florida state court decision has passed on whether the state statute,

⁶ The lack of redressability was specifically raised by respondent at trial. (T75-76)

⁷ The language of Ordinance No. 87-71 is similar to that of § 828.12, but that similarity alone does not render § 828.12 subject to constitutional challenge by petitioners. In order to remove the barrier to ritual sacrifice that § 828.12 erects, petitioners are required to mount a constitutional challenge to that section directly. This they have failed to do.

§ 828.12, prohibits animal sacrifice, *see* abstention discussion *infra* at 18-25, *amici* note that several arrests have indeed been made under this statute for animal sacrifice. On one occasion, three persons were arrested including a Ms. Ofelia Cueli-Garcia who "was arrested after a policeman saw her cut off a chicken's head and drink the blood."⁸ On another, some 13 Santeria practitioners were arrested when police were called to a sacrifice scene after neighbors mistook the screams of the dying animals for those of a child.⁹

Second, various other local prohibitions would also continue to apply to petitioners, such as those governing zoning, health and sanitation, and licensing. (A29) Neither § 828.12 nor these local prohibitions were challenged by petitioners. (A23, A29)

Absent a showing of what would constitute "redressability," of course, "there can be no confidence of 'a real need to exercise the power of judicial review'" on petitioners' behalf. *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (quoting *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-22 (1974)). In this case, judicial review by this Court would result in what would amount to the rendering of a purely advisory opinion on a local ordinance's constitutionality — a "ruling" which would be contrary to the overwhelming weight of precedent. *See Larson*, 456 U.S. at 271. For, again, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). Ruling on the constitutional question supposedly presented in this case is clearly avoidable — and to be avoided by this Court. *Cf. Lyng*, 485 U.S. at 446 (before passing on constitutional issue, courts below required to determine whether decision on that issue

⁸ *See Three Santeria Worshipers Charged With Animal Cruelty*, UPI, Apr. 26, 1991, available in LEXIS, Nexis Library, UPI File.

⁹ *See Animal Sacrifice Debate Rekindled*, UPI, Apr. 15, 1991, available in LEXIS, Nexis Library, UPI File.

would have entitled plaintiffs to more relief than from their statutory claims — if no additional relief warranted, constitutional decision would have been unnecessary and thus inappropriate).

C. Mootness

The justiciability problems inherent in this case are compounded by the additional problem of mootness. Because of Article III's "case or controversy" requirement, the trial court was without power to decide a case which had become moot; the issues presented were required to be "live," and the parties needed a "personal stake" in the outcome of the litigation. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). The "controversy," moreover, was required to exist throughout the course of the entire litigation. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Doe v. Sullivan*, 938 F.2d 1370, 1384 (D.C. Cir. 1991) (THOMAS, J., dissenting).

Petitioners' claim has been rendered moot on this appeal by their own actions. *See Deakins*, 484 U.S. at 200 (holding case mooted by plaintiff's withdrawal of claim for equitable relief); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-13 (1989) (same); *see also* 13A Charles A. Wright, *et al.*, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.2 at 231 (1982). The evidence at trial established that from the time petitioners sought to establish a church, their mission was changing — and these changed circumstances have transformed what may have been a formerly "live" controversy into one whose resolution can have no impact on petitioners.

Petitioner Church of the Lukumi Babalu Aye, Inc. ("church") originally sought to establish itself at 173 West 5th Street in the City of Hialeah. Even at that early stage, the promoters decided that the function of the church would be *primarily* education, *not* sacrifice, by "establishing and promoting research among scholars to research this faith. . . ." (R648) Petitioner Pichardo indicated that the education function would occur on a broad basis: "[w]e can in fact educate right across the board *our* religious community *and* those who are *not* our religious community." (R660) (emphasis

added) Subsequently, the sacrifice function of the church apparently dropped out altogether when it moved to its present location at 700 Palm Avenue, for the mission of the church at its *new* location is *strictly* educational (R666), and involves education *not* of Santeros but of the non-Santerian public. (R860) *Indeed, that animal sacrifice would not ever take place at the new location has been clear to petitioners from the onset.* Said petitioner Pichardo at trial:

"[w]e know that 700 Palm Avenue is not zoned for any animal sacrifices *and we never intended to have it at that location.*"

(R848) (emphasis added). In fact, petitioners acknowledged at trial that animal sacrifice would be inappropriate at its present church site since it is located in a shopping center. (R849) Since the church site has been the only location where petitioners in this non-class-action have sought to sacrifice,¹⁰ the disavowal of their intention to sacrifice at the church site renders this case moot. *Cf. Bowen v. Roy*, 473 U.S. 693, 720-23 (STEVENS, J., concurring); *id.* at 713-15 (BLACKMUN, J., concurring) (noting probable mootness problem). Moreover, petitioner Pichardo has indicated

¹⁰ At trial, Pichardo repeatedly testified that part of his mission was to have sacrifice take place only at the church, thus bringing Santeria above-ground and providing a place where sanitation could be ensured. Moreover, as the case was not a class action, the only claims before the district court were those of the church and Pichardo. Petitioners' assertion at trial, then, that they were seeking to vindicate the rights of all Hialeahan Santeros to sacrifice animals wherever and whenever they wished (R215-16), was not only *not* their claim to make, but was *inconsistent* with their theory of the case. Indeed, it appears that Pichardo's dream of bringing Santeria out into the open is not shared by many Santeros in Hialeah. See Paige Elizabeth-Pruitt, *A Comparative Study of Yoruba Influence in Santeria* 15 (1988) (unpublished M.A. thesis, Florida State University) ("Recently, during the month of June, 1988, . . . L. Ernesto Pichardo established a *Santeria* church . . . which became the first formal place of worship for the sect. Many *santeros* were irate, claiming they felt Pichardo was trying to establish himself as leader, even though there is supposedly no hierarchy within *Santeria*").

that he no longer is a practicing priest involved with the ritual sacrifice of animals. He has shifted his attentions instead to research and education. (R859-60) It is for this reason that he has almost absolutely no knowledge of Santeria as it is practiced in Hialeah. (R859-60) In fact, at trial Pichardo admitted that the last time he had performed an animal sacrifice was *ten years ago* — and *that* sacrifice occurred in Mexico City, Mexico. (R685)

Since petitioners *no longer* present an interest in performing sacrifices at the current church location (if they ever *did*), and since the purpose of petitioners' church *has evolved* into one of education *exclusively* (if it ever was anything else), their case has been rendered moot because, *inter alia*, petitioners no longer have a "personal stake in the outcome" of this controversy. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990). For, precisely because the "church" can now most accurately be characterized as an academic Santerian think tank, with the "priest" Pichardo as its chief academician, the question of whether *petitioners* can constitutionally be forbidden from *sacrificing animals in Hialeah* is an *academic* one, which fails to present a "case or controversy."¹¹

¹¹ Of course, to the extent that petitioners are able to argue that the case only *looks* moot — *i.e.*, that it is only due to the "chilling effect" of the ordinances that the "church" is no more than a Santerian studies center ("[i]n the meantime, we're handcuffed" (R666)) — such an argument is *only* possible because the case was so *unripe* when commenced. Had Pichardo first been fined \$5 or sentenced to a half-day jail term for *actually* sacrificing animals, one could be certain that in fact he *wanted* to sacrifice in Hialeah and that he was sacrificing *no longer* because of the fear of further prosecutions. As things stand, however, we cannot be certain whether Pichardo has not broken his decade-long sabbatical from animal sacrifice because of the mere existence of the ordinances, or whether it is due to the failed pipe dreams of a self-proclaimed Santerian "priest"/academic who nonetheless is delighted that his theoretical and sanitized version of "Santeria" is being aired in the United States Supreme Court. The possibility of the latter was crystallized by the following colloquy at trial:

(continued on next page...)

D. Abstention

Moreover, not only are there *ripeness*, *standing*, and *mootness* problems with this case which render it unsuitable for decision, but because it also involves difficult threshold issues of unsettled state law, very real *abstention* concerns are also present. In general, federal courts have a duty to adjudicate federal questions which are properly before them. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'CONNOR, J., concurring). An exception to that duty is found, however, in the doctrine of abstention. *Id.* In fact, "the proper course for federal courts [is to consider] *first* whether abstention is required." *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 477 (1977) (emphasis added); see also Laurence H. Tribe, *American Constitutional Law* § 3-28, at 195-98 (2d ed. 1988).

Although this Court has developed several forms of abstention, those principles first enunciated in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), are applicable here. *Pullman* abstention holds that federal courts should abstain from deciding a case such as this where the federal constitutional question can be addressed *only* by *first* resolving one or more difficult questions of unsettled state law. Because those questions

¹¹(...continued from preceeding page)

"THE COURT: Would I be less than candid in saying that this is more right now in your own mind a dream than it is a reality?

[PICHARDO]: No, I would not say that would be fair."

(R873) *Amici* submit that the trial record as a whole, however, fairly establishes that *Pichardo* was less than candid in his answer, for it is quite evident that the *Pichardian* brand of "Santeria" — replete with a "fining system" for "deviants" and a "testing" procedure to determine "true" adherents — exists nowhere except perhaps in *Pichardo's* mind. See Migene Gonzalez-Wippler, *Santeria: African Magic in Latin America, passim* (6th ed., Original Publications 1990) (1973).

are unsettled, the district court should have "exercise[d] its wise discretion by staying its hands." *Pullman*, 312 U.S. at 501.¹²

Pullman abstention is based upon two principles: first, that federal courts should avoid the unnecessary resolution of federal constitutional issues; and second, that state courts should provide the authoritative adjudication of state law questions. *Brockett*, 472 U.S. at 508 (O'CONNOR, J., concurring).¹³ Abstention is particularly appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication,'" or which might modify the constitutional question in a material way. *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)). That a statute is merely "unconstrued" will not dictate abstention. *City of Houston v. Hill*, 482 U.S. 451, 469 (1987). Neither will "a bare, though unlikely" possibility that a statute will be subject to a limiting construction by state courts. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984). Instead, in order to warrant abstention, this Court has required that a statute be "*obviously* susceptible of a limiting construction." *Id.* (emphasis added) (internal quotation omitted).

Certain types of cases are more likely to warrant abstention. Among them

"are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitu-

¹² The prospect of abstention was specifically drawn to the court's attention at trial. (R22-23)

¹³ Such abstention is not without its costs, for there are "delays inherent in the abstention process." *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975). For this reason, this Court has counselled that the doctrine be invoked only in "'special circumstances,' and only upon careful consideration of the facts of each case." *Id.* (quoting *Zwickler v. Koota*, 389 U.S. 241, 248 (1967)).

tional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong. The same considerations apply where . . . the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute."

Harris County Comm'rs, 420 U.S. at 84 (citations omitted). Cases raising questions under the First Amendment are not immune to abstention concerns; for "even in cases involving First Amendment challenges . . . abstention may be required." *Brockett*, 472 U.S. at 510 (O'CONNOR, J., concurring). The First Amendment cases in which this Court has expressed doubt concerning abstention all have involved *facial* challenges. See, e.g., *Hill*, 482 U.S. at 467 ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment"). Because this case does *not* involve a facial challenge (A41), see *supra* at 7,¹⁴ abstention is appropriate here. Indeed, this is a case whose facts "call most insistently for abstention," in two respects. See *Harris County Comm'rs*, 420 U.S. at 84.

Petitioners challenge Ordinance 87-40, which incorporates by reference Chapter 828 of the Florida Statutes. The meaning of one section of those statutes, § 828.12, is unclear as a matter of Florida law. That section provides, in relevant part, that "[a] person who unnecessarily . . . mutilates, or kills any animal, or causes the same to be done, . . . is guilty of a misdemeanor of the first degree." Fla. Stat. § 828.12(1). The meaning of this section is

¹⁴ The district court was clearly correct in holding that petitioners could not mount a facial challenge to the ordinances since petitioners have not disputed the proposition that the ordinances would be constitutional as applied to the killing of animals in *non-religious* rituals or ceremonies, cf. *United States v. Salerno*, 481 U.S. 739, 745 (1987), nor have they argued that the ordinances are "so broad that they may inhibit . . . third parties" from exercising their First Amendment rights. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (citations omitted). Petitioners have not even attempted to demonstrate "from actual fact that a substantial number of instances exist" in which the ordinances cannot be constitutionally applied. See *id.* at 14.

pivotal because whatever it *may* mean, *that* meaning preempts conflicting local ordinances because of § 828.27(6) of the Florida Statutes, which provides that

"[n]othing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty which is identical to the provisions of this chapter or any other state law, except as to penalty. *However, no county or municipal ordinance relating to animal control or cruelty shall conflict with the provisions of this chapter or any other state law.*"

Fla. Stat. § 828.27(6) (emphasis added). Clearly, the ordinances at issue in this case *relate* to animal control or cruelty. Whether they *conflict* with any provision of the Florida Statutes, however, is much less clear.

Ruling on petitioners' wholly separate prayer for relief seeking a declaration that, as a matter of state law, the ordinances were preempted by state statutes (see JA16), the district court found that "[t]he ordinances do not conflict with [state law] . . . but [merely] clarify [it]. . . ." (A22-23)¹⁵ While the ordinances may indeed "clarify" rather than "conflict," one can easily imagine a Florida state court ruling to the contrary.¹⁶ A comparison

¹⁵ The only support relied upon by the district court was the opinion of the Florida Attorney General that the "ritual slaughter" exemption, Fla. Stat. § 828.22(3), applies only to religious slaughtering of animals for the primary purpose of food consumption. (A31) See Atty. Gen. Op. 87-56 (July 13, 1987). Although the opinions of the Florida Attorney General are "persuasive and entitled to great weight in construing the Florida Statutes," *State v. Office of Comptroller*, 416 So.2d 820, 822 (Fla. Dist. Ct. App. 1982), they can be no substitute for the *authoritative* opinions of, for example, the Florida Supreme Court.

¹⁶ Of course, *amici* would urge that the ordinances *do* "clarify" state law rather than "conflict" with it. The following discussion serves merely to demonstrate for this Court the obvious susceptibility to limiting constructions of the state and local laws at issue, thus calling for *Pullman* abstention.

between the language of the statute and the ordinance is instructive. Section 828.12 of the Florida Statutes provides for the punishment of a person "who unnecessarily . . . kills any animal, or causes the same to be done." Section 1 of Ordinance No. 87-71 tracks the language of § 828.12, defining "sacrifice" as "unnecessarily . . . kill[ing] any animal, or caus[ing] the same to be done." See Hialeah Ordinance 87-71 § 3 (making it "unlawful for any person . . . to sacrifice any animal").

The district court appears to have been considerably influenced by the apparent symmetry between § 828.12 and Ordinance 87-71. (See A31-32) Yet such symmetry establishes nothing *per se*. For example, suppose the Hialeah City Council had been concerned with widespread killing, by lethal injection, of unwanted household pets. If the council included "euthanasia of animals" within a proscription against "unnecessarily . . . killing any animal, or causing the same to be done," the language of the ordinance would mirror that of the state statute, but would nonetheless conflict with Chapter 828 of the Florida Statutes, which clearly permits euthanasia of animals by lethal injection. See Fla. Stat. §§ 828.055-.065. As a consequence, that ordinance would be preempted under § 828.27(6) as a matter of Florida law.

The same is arguably true on the facts of this case: Ordinance 87-71 is a "clarification" only if Florida lawmakers would characterize ritual sacrifice as an *unnecessary* killing. If they would not, then Ordinance 87-71 adds too much to § 828.12. It would add a characterization which the state legislature would not have. As a consequence, Ordinance 87-71 would then create a "conflict" within the meaning of § 828.27(6), a "conflict" which is preempted under § 828.27(6) as a matter of Florida law — which would mean that Ordinance 87-71 is a nullity irrespective of any federal constitutional problems there may or may not be with it. Thus, a Florida court might very well "construe [§ 828.12] in a fashion that would avoid the need for a federal constitutional ruling." *Harris County Comm'rs*, 420 U.S. at 84. As this Court has noted, in such a case "the argument for abstention is strong." *Id.*

Related to the abstention problem is a particularly delicate issue of federalism, because petitioners' challenge also implicates a section of the Florida Constitution, article 1, § 3, whose impact upon the challenged ordinances is unclear as a matter of Florida constitutional law. That section provides, in relevant part, that "[t]here shall be no law . . . prohibiting or penalizing the free exercise [of religion. Yet, on the other hand,] [r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. 1, § 3 (1968 Revision) (emphasis added). Whatever this section of the Florida Constitution may mean, *that* meaning, as a matter of state constitutional law, is pivotal because it perforce works to void as unconstitutional any conflicting local ordinances. Whether the ordinances at issue here are unconstitutional as "law[s] . . . prohibiting or penalizing the free exercise [of religion]" under article 1, § 3 is unclear.¹⁷ One can search the district court opinion in vain for any reference to the Florida Constitution, see *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), but the resolution of this case under the Florida Constitution may very well be "the nub of the whole controversy," *Harris County Comm'rs*, 420 U.S. at 85 (internal quotation omitted), thus making adjudication of the federal constitutional issues unnecessary on grounds of federalism.

As this Court has noted, "[t]his use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority." *Pullman*, 312 U.S. at 501. This "harmonious relation" can only be furthered if the federal courts adhere to the proposition that "[s]tate courts are the principal expositors of state law." *Moore v. Sims*, 442 U.S. 415, 429 (1979). This is particularly true in this case involving important issues of state law. See *Elkins v. Moreno*, 435 U.S. 647, 678

¹⁷ Of course, *amici* would urge that the ordinances do *not* conflict with the state constitution. As with the earlier discussion as to the possibility of preemption as a matter of state law, the discussion here serves merely to demonstrate to this Court the obvious susceptibility of the ordinances to a state court finding of unconstitutionality. This susceptibility counsels for *Pullman* abstention.

(1978) (REHNQUIST, J., dissenting). And for the State of Florida, the importance of the proper, largely state-ascertained balance between religiously-inspired action and public health, safety, welfare, and morals is obvious from the history of her Constitution. In 1868, the Florida Constitution was amended to include the principle that "the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the state." Fla. Const. of 1868, Dec. of Rts. § 4, 25 Fla. Stat. Ann. 441 (West 1970). In 1885, a further reference to the requirement that religion had to comport with "moral safety" was added, and that reference survived for eighty-three years. *Id.* § 5, 25 Fla. Stat. Ann. 479, 482 (West 1970). In 1968, the current version of Florida's "Free Exercise Clause" was adopted, tightening the reins on religious practices, providing that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. 1, § 3 (1968 Revision).

In sum, since it is entirely possible that a Florida court may "be likely to construe [the ordinances] in a fashion that would avoid the need for a federal constitutional ruling," *Harris County Comm'rs*, 420 U.S. at 84, that likelihood makes abstention appropriate here — particularly because state law provides for certification to the Florida Supreme Court of "questions or propositions of the laws of [Florida] which are determinative of [a] cause." See Fla. Stat. Ann. § 25.031 (West Supp. 1992). Although the mere availability of certification is not in itself sufficient to warrant abstention, this Court has "recognized the importance of certification in deciding whether to abstain." *Hill*, 482 U.S. at 470, for "[s]peculation by a federal court about the meaning of a state [law] in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court." *Brockett*, 472 U.S. at 510 (O'CONNOR, J., dissenting). In fact, in *Employment Div., Dept. of Human Resources v. Smith*, 485 U.S. 660 (1988) (*Smith I*) this Court refused to speculate in order to reach the federal constitutional question. *Id.* at 673 ("in the absence of a definitive ruling by the Oregon Supreme Court we are

unwilling to disregard the possibility that the State's legislation regulating the use of controlled substances may be construed to permit peyotism or that the State's Constitution may be interpreted to protect the practice").

The sovereign State of Florida has declared its dedication to the free exercise of religion *and*, at the same time, to public morals, peace, and safety *and* to the humane treatment of animals. The State of Florida, therefore, at least as an initial matter, should be allowed to place Hialeah Ordinances 87-52, 87-71, and 87-72 on the scales without having to suffer the "unnecessary friction" caused by premature federal court adjudication. See *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). The district court should have abstained until the uncertain — and possibly dispositive — issues of state law had been decided by a Florida state court.

E. The Factual Finding

Finally, petitioners face an insurmountable problem with a critical fact in this case. An allegation of discriminatory "intent" or "purpose" or "motive" has always been part and parcel of petitioners' constitutional challenge to the ordinances. In their verified complaint (JA6, JA10-14), and at trial (R11, R32, R69-70, R80, R136-37, R144, R148, R158, R178, R182-85, R188, R192-93, RR196, R250-51, R255, R258-59, R478-80, R514-20), and in oral argument after trial (T16-17, T28-35, T63, T86), and indeed in this Court, see *Petitioners' Pet. for Writ of Cert.* at 8, 12, *Petitioners' Br.* at 3, 14-15, 27, petitioners have clearly stated their position that the ordinances are unconstitutional because they were enacted by respondent *with the intent to chill the free exercise of petitioners' religion*. After a 9-day bench trial, this contention was flatly rejected by the district court who, as already noted, found *as a matter of fact* that there was no evidence to establish petitioners' contention that the ordinances had been passed with discriminatory intent (A28, A49) — "the council members' intent," said the court, was only "to stop the practice of animal sacrifice in the City." (A28) There is before this Court, therefore, nothing left to petitioners' constitutional claim *as they framed it* but an adverse finding of fact by the district court, affirmed by the court of

appeals, and corroborated by the singularly striking detail that respondent actually granted petitioners a certificate of occupancy to open their doors as a church in the City of Hialeah. The writ of *certiorari*, then, has brought nothing before this Court but a finding of fact, agreed upon by both lower courts, which this Court will not disturb because that finding of fact is not clearly erroneous. See *United States v. Ceccolini*, 435 U.S. 268, 273 (1978).

CONCLUSION

The justiciability problems of this case — of ripeness, standing, mootness, and abstention — make it an unworthy vehicle for an important elucidation of this Court's Free Exercise jurisprudence, especially as nothing remains for this Court's review but a finding of fact upon which the district and circuit courts agreed. Accordingly, the Court should, metaphorically speaking, "abstain from meats offered to idols and from blood, and from things strangled," *Acts* 15:29 (King James), and dismiss the writ of *certiorari* as improvidently granted.

Dated: New York, New York

July 31, 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC. AND
ERNESTO PICHARDO, PETITIONERS

v.

CITY OF HIALEAH

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**BRIEF FOR THE HUMANE SOCIETY OF THE
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THE AMERICAN SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS, ANIMAL LEGAL DEFENSE
FUND, INC., AND MASSACHUSETTS SOCIETY FOR
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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the challenged Hialeah ordinances should be sustained as "neutral, generally applicable regulatory law[s]," not requiring any "compelling state interest" justification.

2. Whether the ordinances are in any event justified by the City's compelling interests in public health and animal protection.

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American Humane Association, <i>Report on the Summit on Violence Towards Children and Animals</i> (1991)	26
American Society for the Prevention of Cruelty to Animals, Annual Report (1990)	27
G. Braxton, <i>Challenge to Sacrifice Law Blocked</i> , L.A. Times, Nov. 10, 1990	7
G. Carson, <i>Man, Beasts, and Gods</i> (1972)	21
G. C. Chavez, <i>Santeria: A Cult of Sacrifice</i> , U.P.I., Oct. 11, 1981	7
M. Chazanov, <i>The Slaughter on Franklin Street—'It's Not a Big Deal'</i> , L.A. Times, Mar. 21, 1991....	7-8
Cong. Globe, 37th Cong., 1st Sess. 2506 (1862)	14
D. Favre and M. Loring, <i>Animal Law</i> (1983)	20
Fla. Atty. Gen'l Opinion 87-56 (1987)	5
T. Jefferson, A Bill for Establishing Religious Freedom (June 12, 1779), in 5 <i>The Founders' Constitution</i> 77 (P. Kurland and R. Lerner eds., 1987)	16
A. Jetter, <i>Goat Head in Park Stirs Santeria Fear</i> , Newsday, May 2, 1989	7
S. Kellert, "Attitudes and Characteristics of Hunters and Anti-Hunters and Related Policy Suggestions" (1976)	28
E. Leavitt & D. Halverson, "Animal Protective Organizations and Law Enforcement Agencies," in <i>Animals and Their Legal Rights</i> (4th ed. 1990)	27
E. Leavitt & D. Halverson, "The Evolution of Anti-Cruelty Laws in the United States," in <i>Animals and Their Legal Rights</i> (4th ed. 1990)	21
Letter from James Madison to Edward Livingston (July 10, 1822), in 5 <i>The Founders' Constitution</i> 105 (P. Kurland and R. Lerner eds., 1987)	16
R. Lockwood and G. Hodge, "The Tangled Web of Animal Abuse: The Links Between Cruelty to Animals and Human Violence," 31 <i>Humane Society News</i> No. 3 (Summer 1986)	26

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S. Morison, <i>Builders of the Bay Colony</i> (1930)	21
H. Nelson, "The Case for Hunting on National Wildlife Refuges," in <i>Advances in Animal Welfare Science 1986/87</i> (M. Fox & L. Mickley eds., 1986)	29
<i>Police Rescue Animals From Alleged Cult Group</i> , Reuters, June 9, 1987	8
W. Robinson, "The Case for Hunting," in <i>Advances in Animal Welfare Science 1986/87</i> (M. Fox & L. Mickley eds., 1986)	29
C. Sanchez, <i>Animal Sacrifice Ritual Spurs Rights Debate in D.C.; Santeria Priest Threatens Slaughter Protest</i> , Wash. Post, Nov. 30, 1987....	7
C. Stevens & D. Halverson, "Fighting and Baiting," in <i>Animals and Their Legal Rights</i> (4th ed. 1990)	23
<i>Strange Cemetery Rituals Reported</i> , U.P.I., Nov. 12, 1991	8
M. Warren, <i>That Dirty Water; Miamians Love and Hate Their Smelly River</i> , L.A. Times, Apr. 12, 1992	7
Webster's New Collegiate Dictionary (9th ed. 1990)	13
J. Wynne-Tyson, <i>The Extended Circle: A Dictionary of Humane Thought</i> (1985)	22

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-948

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THE PREVENTION OF CRUELTY TO ANIMALS AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF THE *AMICI CURIAE*

The *amici*, the Humane Society of the United States ("HSUS"), American Humane Association ("AHA"), the American Society for the Prevention of Cruelty to Animals ("ASPCA"), Animal Legal Defense Fund, Inc. ("ALDF"), and Massachusetts Society for the Prevention

of Cruelty to Animals ("MSPCA"), are organizations that have long dedicated themselves to preventing cruelty to animals, promoting animal welfare, and ensuring respect for the well-being of all living creatures. They have a substantial interest in supporting government measures that seek to protect animals and to prevent the wanton and willful infliction of cruelty upon animals. To further the interests of animals locally, nationally, and internationally, the *amici* sponsor, draft, and testify in support of legislation advancing animal welfare, investigate and enforce state laws and ordinances preventing cruelty to animals, educate the populace concerning the humane treatment of animals, and operate animal hospitals and shelters. The questions raised here are of specific concern to *amici*, one of which (HSUS) was directly involved in drafting and testifying in favor of the Hialeah ordinances being challenged.¹

STATEMENT OF THE CASE

Petitioners' attack on the Hialeah ordinances proceeds from the erroneous premise that the ordinances prohibit only the sacrifice of animals for religious reasons. In fact, however, the ordinances broadly ban *all* ritualistic killing of animals, as well as other forms of animal cruelty and unnecessary killing. Petitioners attempt to draw comfort from this Court's recent decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), but in fact *Smith* strongly supports the validity of the ordinances. The Court in *Smith* acknowledged that a Free Exercise Clause violation could occur if a state "sought to ban [physical] acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display." *Id.* at 877 (emphasis supplied). Pe-

¹ Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk of the Court.

titioners try throughout their brief to characterize the Hialeah ordinances as just such measures, but they do so only by disregarding the language of the ordinances themselves and the well-supported factual findings of the district court. The district court's thorough opinion, which itself was cited with apparent approval in *Smith*, *id.* at 889, demonstrates that the ordinances are measures of general applicability, not limited to religious practices, and that the ordinances serve compelling state interests in public health and animal protection.

A. Hialeah's Regulation Of The Killing Of Animals

The four ordinances at issue here were adopted by the City of Hialeah in 1987. The ordinances are similar to provisions that have been adopted in other cities.²

Initially, on June 9, 1987, the Mayor and City Council of Hialeah, observing that the citizens of Hialeah had "expressed great concern over the potential for animal sacrifices being conducted in the City," adopted in its entirety an existing Florida statute dealing with cruelty to animals. Pet. Br. A1.³ Chapter 828 of the Florida Statutes, which was adopted by the City in Ordinance No. 87-40, had for years provided criminal penalties for anyone who "unnecessarily . . . tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done" Pet. Br. A5. Hialeah chose to make such conduct a violation of local, as well as state, law.

Three months later, on September 8, 1987, the City adopted Ordinance No. 87-52, the operative portion of which is entitled "Prohibition Against Possession of Animals for Slaughter or Sacrifice." Pet. Br. A1-A2. The ordinance generally prohibits the sacrifice or slaughter of any animal, except for the slaughtering of animals

² See, e.g., Chicago Code § 7-12-300 (1990); Los Angeles Code § 53.67 (1990).

³ "Pet. Br." refers to petitioners' brief in this Court.

that were specifically raised for food purposes and that are slaughtered by licensed establishments operating in properly zoned areas and in accordance with state and local law and regulations. Under the ordinance's definition, "sacrifice" means "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at A1.

Finally, on September 22, 1987, the City adopted Ordinance No. 87-71 and Ordinance No. 87-72. Based on the City Council's finding that "the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," Ordinance No. 87-71 flatly prohibits the sacrifice of any animal in Hialeah. The ordinance's definition of "sacrifice" is the same as that used in Ordinance No. 87-52. Pet. Br. A2-A3. Ordinance No. 87-72 prohibits the "slaughter [of] any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house." *Id.* at A3. Under the ordinance's definition, which follows the definition used in Ordinance No. 87-52, "slaughter" means "the killing of animals for food." Ordinances 87-71 and 87-72 also authorize registered societies and associations for the prevention of cruelty to animals to investigate animal cruelty complaints.

For more than a century, Florida has sought to outlaw animal cruelty. See Fla. Stat. ch. 3921 (1889). Chapter 828 of the Florida Statutes, which Hialeah adopted in Ordinance No. 87-40, prohibited animal sacrifice and other forms of animal cruelty long before Hialeah enacted the ordinances now under attack. See Fla. Stat. ch. 4971 (1901), the precursor of Fla. Stat. § 828.12 (1987).

Like the Oregon controlled substances statute that was at issue in *Smith* (see 494 U.S. at 874), the Florida statute adopted by Hialeah included some secular exceptions. See, e.g., Fla. Stat. Ann. §§ 828.22-828.26 (slaughter

of animals for food); § 828.02 (advancement of medical science). The Florida law expressly exempted the ritual slaughter of animals, see Fla. Stat. Ann. § 828.22(3), provided the slaughter was humane, see § 828.23(7)(b), but the State never permitted animal sacrifice. See Fla. Atty. Gen'l Opinion 87-56, at 5, 8 (1987) (the term "slaughter" as used in sections 828.22 to 828.26 refers only to killing animals for food, and Section 828.12 prohibits sacrifice of animals for a purpose other than food). As the district court recognized, "[t]his Ordinance [i.e., Ordinance No. 87-52] was not meant to single out persons engaged in ritual sacrifice, but to put those persons on notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter, done in slaughterhouses." Pet. App. A39.

B. Church Of The Lukumi Babalu Aye

1. General Background

Petitioner Church of the Lukumi Babalu Aye, Inc. is a non-profit corporation that promotes and practices the Lukumi religion in South Florida. The religion is also referred to as Yoba, Yoruba, or Santeria. Pet. App. A4. Petitioner Ernesto Pichardo is the president of the petitioner church. Although the practice of Santeria dates back many years, the religion lacks any written code or doctrine (with the exception of written tenets recently prepared by Pichardo, possibly in contemplation of this litigation). *Id.* at A7-A8. The religion involves no organized worship and no central authority for the training or certification of priests. *Id.*

On April 1, 1987, the petitioner church took possession of a site in the City of Hialeah, intending to use the property to establish a church, school, and cultural center. Pet. App. A22. After routine administrative inspections, the City issued a certificate of occupancy to the Church. *Id.* at A26.

2. Animal Sacrifice

As a part of their rituals and ceremonies, practitioners of Santeria sacrifice animals, including chickens, pigeons,

doves, ducks, guinea fowl, goats, sheep, and turtles. Pet. App. A9. The sacrifices are performed in rites of initiation, healing, and funerals. *Id.* at A15-A17. On the basis of Pichardo's testimony, the district court estimated that between 12,000 and 18,000 animals are sacrificed annually in Dade County in initiation rites alone. *Id.* at A15 n.22. Most of these animals are obtained from botanicas or local farms that breed the animals specifically for sacrifice.⁴ *Id.* at A17. While at the botanicas or farms, the animals are fed and watered only irregularly, and they are frequently housed in "overcrowded and filthy" conditions. These conditions can cause intense suffering. *Id.* at A17-A18.

After being purchased for Santeria rituals, animals are often stored with animals of other species under crowded conditions, causing "great stress and anxiety." Pet. App. A14. During the sacrifices, animals can sense the bodily secretions of other animals that have just been killed, thus producing intense fear, and sometimes pain, in those animals awaiting sacrifice. *Id.* at A14 & n.19. Moreover, as the district court correctly found, the method of killing used in Santeria sacrifices is not humane. *Id.* at A13. The stabbing or puncture method used by Santeria practitioners "is not a reliable or painless method of severing both carotid arteries" and therefore "is not accepted from either a traditional standpoint or a humane standpoint." *Id.*

The Santeria sacrifices create wastes, resulting in obvious disposal problems. After an animal is killed, its blood is drained into clay pots. Pet. App. A15. The animal is then decapitated and its carcass removed. *Id.* The animal's blood is either placed before the Santeria deities or sprinkled on worshipers or drunk. *Id.* at A15 & n.21. Some of the animals are butchered and eaten, although the sheer number of animals sacrificed makes it highly implausible that this procedure is followed for

⁴ Botanicas are religious specialty stores, many of which traffic in sacrificial animals and other items associated with Santeria. Pet. App. A17 n.28.

all of them. *Id.* at A16. Moreover, it is undisputed that animals used in healing and death rites are not consumed and must be disposed of in other ways. *Id.* at A16-A17 & n.27.

Not coincidentally, animal remains are often found in public places in South Florida, including near rivers and canals, by four-way stop signs, under palm trees, and on people's lawns and doorsteps. Pet. App. A18 & n.29. At least some of these remains have been found to be the result of Santeria practices. *Id.* at A18.⁵

⁵ In what has become part of the aquatic scenery, decapitated chickens and other animals are routinely seen floating in the canals and waterways that meander through South Florida. G.C. Chavez, *Santeria: A Cult of Sacrifice*, U.P.I., Oct. 11, 1981. Practitioners of Santeria "keep garbage crews busy hauling 48 decapitated chickens from the water each month." M. Warren, *That Dirty Water; Miamians Love and Hate Their Smelly River*, L.A. Times, Apr. 12, 1992, at A2, col. 1.

Lamentably, the carnage is not limited to South Florida. In Washington, D.C., when a gathering of about 200 people was interrupted by Humane Society officers who seized a goat, calf, pig, and other animals intended for sacrifice, the person in charge of the sacrifice threatened to kill the animals in front of the White House. C. Sanchez, *Animal Sacrifice Ritual Spurs Rights Debate in D.C.; Santeria Priest Threatens Slaughter Protest*, Wash. Post, Nov. 30, 1987, at C1. As a result of animal sacrifices in New York City, park officials often find items like a goat's head or paper bags filled with chicken feet and blood-smeared paper dolls. A. Jetter, *Goat Head in Park Stirs Santeria Fear*, Newsday, May 2, 1989, at 19. In suburban New Jersey, men were arrested after beheading animals in a ceremony, smearing their garments with the animals' blood, and drinking some of the blood. Twenty-one people in the nearby Atlantic City area were arrested for similar cruelty to animals. Authorities found not only animal carcasses at the sites of these rituals, but cauldrons of blood as well. J. Meyer, *Animal-Slaughter Cult Growing, Police Say*, U.P.I., July 25, 1985. There have been so many complaints in Los Angeles concerning the discovery of animal bodies in parks and trash containers that the City Council recently enacted an ordinance banning the sacrifice of animals. G. Braxton, *Challenge to Sacrifice Law Blocked*, L.A. Times, Nov. 10, 1990, at Metro B4. In Santa Monica, California, the sacrifice of three lambs and a dozen chickens caused an overflow of blood from the basement drain into the parking lot of

C. The District Court's Decision

In September 1987, petitioners brought this action, seeking declaratory and injunctive relief against the City on the ground that the Hialeah ordinances allegedly violated petitioners' First and Fourteenth Amendment rights to the free exercise of religion. J.A. 6-17. Following a nine-day bench trial, during which the court heard extensive factual and expert testimony regarding Santeria, the effect of Santeria practices on animals, and public health and safety concerns arising from animal sacrifice, the district court granted judgment for the City.

The court flatly rejected petitioners' contention that the ordinances were passed to discriminate against the church or to prevent the church from establishing a physical presence in the City. The court found that "[t]here was no evidence to support this contention." Pet. App. A28. The City Council did not intend to single out petitioners for special treatment; rather, "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." *Id.*; see also *id.* at A49 ("The ordinances are not targeted at the Church of the Lukumi Babalu Aye and practitioners of Santeria but are meant to prohibit all animal sacrifice, whether it be practiced by an individual, a religion, or a cult"). Likewise, the court stressed that the ordinances focused on conduct, not on the beliefs associated with Santeria or any other religion: "[T]he ordinances were not passed to interfere

an apartment building. M. Chazanov, *The Slaughter on Franklin Street—'It's Not a Big Deal'*, L.A. Times, Mar. 21, 1991, at Metro B3. The Chicago police found more than a dozen heads of goats, chickens, and other animals in a single apartment often frequented by white-robed worshipers who participated in animal sacrifices. *Police Rescue Animals From Alleged Cult Group*, Reuters, June 9, 1987. In a Falls Church, Virginia cemetery, the site of at least five other incidents, a grieving widow found a gutted chicken, stuffed with a rubber doll in a heart-shaped piece of meat, splayed across her husband's grave and a lamb's carcass decaying on another grave. *Strange Cemetery Rituals Reported*, U.P.I., Nov. 12, 1991. (All of the articles cited in this footnote are available in LEXIS, Nexis Library, Omni File).

with religious beliefs, but rather to regulate conduct." *Id.* at A23; see also *id.* at A38 ("the ordinances clearly are directed at conduct and not belief").

The district court acknowledged that the Hialeah ordinances do impose a burden on petitioners' religious practices. Pet. App. A42. Accordingly, acting prior to this Court's decision in *Smith*, the court applied a balancing test derived from *Sherbert v. Verner*, 374 U.S. 398 (1963), to determine whether that burden was justified. The court found that "[t]he ordinances have three compelling secular purposes: 1) to prevent cruelty to animals; 2) to safeguard the health, welfare and safety of the community; and 3) to prevent the adverse psychological effect on children exposed to such sacrifices." Pet. App. A23. The court concluded that these interests were sufficient to justify the absolute prohibition on animal sacrifice, and it further held that "any effort to exempt purportedly religious conduct from the strictures of the City's laws would significantly hinder the attainment of those compelling interests." *Id.* at A47.

D. The Court Of Appeals' Decision

The court of appeals affirmed. Giving petitioners the benefit of the doubt, the court of appeals found that the ordinances satisfied *Sherbert's* "arguably stricter standard"; the court therefore had no occasion to apply this Court's intervening decision in *Smith*. See Pet. App. A2 & n.1.⁶

SUMMARY OF ARGUMENT

I.

State and local governments are not obliged by the First Amendment to create religious exemptions to neutral and generally applicable regulatory laws. Because of this principle, the City may lawfully prohibit the ritual or ceremonial killing of animals. The Hialeah ordinances fall squarely within the category of neutral and generally ap-

⁶ The court of appeals did not consider the governmental interest in guaranteeing the welfare of children.

plicable laws described in *Smith*. The ordinances do not discriminate against religion; rather, they generally prohibit animal sacrifice and other forms of animal cruelty, regardless of the reasons for such actions.

This result is not changed because the ordinances may have been adopted in response to petitioners' announced intention to conduct animal sacrifice in Hialeah. This Court has not hesitated to uphold the regulation of socially harmful conduct even where the conduct is directly or even exclusively grounded in religion. Nor are the ordinances invalid because of an alleged improper or discriminatory motive among concerned citizens in Hialeah who supported the measures. As the district court correctly found, the purpose of the ordinances was to promote the health and welfare of the community and to prevent cruelty to animals. Neither of these purposes singles out religious practices for special regulation.

II.

Even if the Hialeah ordinances cannot be sustained as neutral, generally applicable regulatory laws, they should nevertheless be upheld because of the compelling governmental interests that they serve. In addition to the interest in public health and safety (well described in the district court's opinion), the ordinances are grounded in a fundamental public policy against unnecessary cruelty or killing of animals. That public policy originated in 17th century New England, and was manifested, throughout the 19th century, by the universal enactment of anti-cruelty statutes (supplemented by a mass of more specialized state and federal protection statutes). The policy continues to be reflected in the broad remedial effects that such laws have had upon animal use, and by the widespread establishment of and public support for humane societies, many of which have been granted enforcement powers. Under this legal regime, the "necessity" of animal killing has generally been determined by reference to tangible human needs such as food, the prevention and treatment of disease, and safety. The public policy against animal cruelty and unnecessary killing is a hallmark of

the progress of American civilization and a part of the basic legal and moral fabric of this society. Furthering that policy clearly constitutes a compelling government interest.

Moreover, as the courts have recognized for more than a century, the anti-cruelty statutes were based on the moral idea that cruelty and unnecessary killing of animals deadens conscience toward all forms of life, thereby promoting violence toward human beings. The state interest in protecting animals is therefore closely related to, and directly serves, the compelling state interest in human life, safety, and public order.

ARGUMENT

I. THE HIALEAH ORDINANCES ARE NEUTRAL AND GENERALLY APPLICABLE REGULATORY LAWS

A. The Ordinances Prohibit All Animal Sacrifices—They Do Not Discriminate Against Religion

The challenged ordinances do not apply merely to petitioners or to the Santeria religion or to religious groups; they impose a neutral and generally applicable ban on animal sacrifices by anyone. The objectives that the ordinances advance—the enhancement of the community's health and welfare and the prevention of cruelty to animals—are clearly secular. As a result, the ordinances satisfy the standard set forth by this Court in *Smith*.

Smith determined that the Free Exercise Clause does not require a neutral and generally applicable regulatory law to make special exceptions for religious practices. Respondents in *Smith* were fired from their jobs with a drug rehabilitation organization because they used peyote, a hallucinogen listed as a controlled substance under both federal and state law. Respondents ingested peyote as part of a religious ceremony at their church. Oregon denied respondents unemployment compensation benefits because respondents were discharged for work-related misconduct. The possession or consumption of peyote was a

crime under Oregon's controlled substance law. Although the Oregon law had certain secular exceptions, which regulated the use of narcotics through licensed practitioners, it provided no exception for the religious use of peyote. This Court held that the First Amendment does not require Oregon to provide a "religious practice" exception to the State's general prohibition against peyote use.

A law is valid, *Smith* concluded, when it regulates the conduct of all citizens without discrimination, and does not target "religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." 494 U.S. at 881-82. Any other rule, the Court said, inevitably "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . ." *Id.* at 888. As an example of the kind of "civic obligations" that would be affected, the Court listed "social welfare legislation such as . . . animal cruelty laws," and it cited the district court's decision in this case. *Id.* at 889.

Nor would it be possible, the Court said, to limit religious exemptions solely to conduct that is "central" to a person's religion. Such a rule would embroil the courts unavoidably in efforts to determine how important or how central a particular regulated or prohibited practice is to a person's religious beliefs. 494 U.S. at 886-87. Such efforts to measure the "centrality" of particular practices or beliefs and, on that basis, to require legislatures to carve out personal exceptions to general laws—and regulations would, in the Court's view, merely exacerbate the tension between the First Amendment and the obligation of state and local governments to regulate the conduct of their citizens. *Id.* at 885.

The Hialeah ordinances, like the state law they adopt, fit well within the description of "neutral and generally applicable" regulatory laws.⁷ The plain meaning of the

⁷ That ritual or ceremonial animal killing would be prohibited by state law, even if the ordinances were invalidated, raises serious questions about the Church's standing under Article III of the Con-

ordinances' text proves the point. As the district court found, the ordinances effect an outright ban on ritualistic or ceremonial animal killings, whether such acts are performed by a fraternity, a practitioner of voodoo, a satanic worshiper, a follower of Santeria, or a person who simply gets his kicks out of sacrificing animals. See Pet. App. A28 ("the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by"). Contrary to petitioners' argument, the killer's motivation—to be initiated into an organization, to worship, or to seek a warped sense of pleasure—is irrelevant.

The City's use of the phrase "ritual or ceremony" is religiously neutral. As the district court observed, "'ritual' is not synonymous with 'religion.'" Pet. App. A39 (citing *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D. N.Y.), *aff'd*, 419 U.S. 806 (1974)). Nor does the phrase "ceremony" have a religious significance. The word "ceremony," defined as "a formal act or series of acts prescribed by ritual, protocol, or convention . . . a conventional act of politeness or etiquette . . . an action performed only formally with no deep significance . . . prescribed procedures," Webster's New Collegiate Dictionary 222 (9th ed. 1990), has been used to describe numerous non-religious acts, including fraternity and sorority activities, see *State v. Capitol Benefit Ass'n*, 21 N.W.2d 890, 892 (Iowa 1946), marriages, see *Sharon v. Sharon*, 16 P. 345, 350 (Cal. 1888), or certain forms of political protest, see *State v. Hodsdon*, 289 A.2d 635, 638 (Del. Super. Ct. 1972).

The word "sacrifice" is also religiously neutral. Contrary to petitioners' claim that "sacrifice is an explicitly religious practice," Pet. Br. 16, the word "sacrifice" is expressly defined in neutral terms in the ordinances. Pet. Br. A1, A2-A3. Whatever meaning "sacrifice" may have in the abstract is irrelevant.

Thus, as the plain meaning of the ordinances confirms, Hialeah does not ban sacrifices "only when they are

stitution. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976).

engaged in for religious reasons, or only because of the religious belief that they display," *Smith*, 494 U.S. at 877; animal sacrifice is banned altogether as inconsistent with the community's values.

B. The Ordinances Do Not Have A Discriminatory Purpose

1. A Regulatory Law Is Not Discriminatory Simply Because Its Enactment Is Prompted By The Emergence Of New Religious Practices

The district court found as a matter of fact that the challenged ordinances have a neutral and secular purpose. The circumstances surrounding the enactment of the ordinances do not alter that fact. Even if the ordinances were adopted in response to petitioners' activities, that would not mean that the ordinances discriminate against religion. Lawmakers are empowered to eradicate socially harmful conduct even if the only people who engage in the conduct are inspired to do so by religious tenets.

Reynolds v. United States, 98 U.S. 145 (1878), for example, demonstrates that a regulatory law can pass muster under the Free Exercise Clause even if it was promulgated in specific response to moral objections to a religious practice. The federal statute at issue in *Reynolds* was enacted to address the social problems associated with polygamy, which was practiced by members of the Church of Jesus Christ of Latter-Day Saints. The federal law specifically annulled an ordinance in which the Territory of Utah had adopted Mormon laws—including those encouraging polygamy—as the laws of the Territory. See Cong. Globe, 37th Cong., 1st Sess. 2506 (1862). This Court rejected a First Amendment challenge to a conviction for violating the federal prohibition against bigamy:

[T]he only question which remains, is whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free.

This would be introducing a new element into criminal law. . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds, 98 U.S. at 166-67.

Similarly, there was no legislative need to address snake handling until such a ceremonial religious practice emerged. Yet every free exercise challenge to the constitutionality of snake handling laws has been rejected. See, e.g., *Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); *Lawson v. Commonwealth*, 164 S.W.2d 972 (Ky. 1942); *State v. Massey*, 51 S.E.2d 179 (N.C.), *appeal dismissed sub nom. Bunn v. North Carolina*, 336 U.S. 942 (1949). Like the ordinances at issue here, the snake handling laws are generally applicable to the community at large. It is undisputed that such laws were enacted to regulate socially harmful conduct in religious ceremonies, but that fact has not affected the validity of the statutes. Both *Lawson* and *Massey* have been favorably cited by this Court as a proper exercise of state police power, despite the religious overtones of the regulations. See *Smith*, 494 U.S. at 889 (citing *Massey*); *Abington School District v. Schempp*, 374 U.S. 203, 249 n.14 (1963) (Brennan, J., concurring) (citing *Lawson* and *Massey*).

The Sunday closing cases also provide examples of religiously-motivated, yet generally applicable and neutral laws. This Court recognized in *McGowan v. Maryland*, 366 U.S. 420 (1961), that Sunday closing laws evolved from "wholly religious sanctions." *Id.* at 435. The Maryland statute challenged in *McGowan* could not have been more explicit in its religious underpinnings; the statute prohibited work or labor on "the Lord's day, commonly called Sunday" or "[t]he Sabbath day, commonly called Sunday." *Id.* at 453, 456. Notwithstanding the obvious religious backdrop, this Court held that Sunday closing laws offend neither the Establishment Clause, *see id.*

at 449, nor the Free Exercise Clause, *see Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion).

These cases demonstrate that laws can be neutral and generally applicable, despite the presence of religious conduct as a catalyst for the legislation. They establish that the government always retains a paramount interest in the preservation of life, health, and safety, and in the suppression of societal violence, even in the face of conduct that is grounded in religious belief.⁸

2. The Subjective Intent Of Persons Supporting The Ordinances Is Irrelevant

The neutral and secular purpose of the Hialeah ordinances also is not abrogated by speculation about the individual motives of persons who sought to prevent animal sacrifice in their community. By citing to selective portions of the minutes of the City Council's meetings, petitioners misdirect the Court's inquiry from the purpose of the ordinances to the subjective motivations of concerned citizens and a few Council members. This Court, however, has recognized the important distinction between legislative purpose and motive. A law appropriating funds for military weapons, for example, may have the purpose of advancing national security; a particular legislator voting in favor of the law may be motivated primarily by the opportunity to employ his constituents. Here, the City's legitimate secular and neutral purposes for the ordinances have been established. Speculation about the circumstances in which the ordinances were

⁸ The Founding Fathers, aware as they were of the potential for religious belief to be a deep reservoir of justifications for extremes of nonconforming behavior, contemplated similar limits to free exercise. James Madison believed that religion must be subject to civil power when it trespasses on private rights or the public peace. Letter from James Madison to Edward Livingston (July 10, 1822), in 5 *The Founders' Constitution* 105 (P. Kurland and R. Lerner eds., 1987). Thomas Jefferson's views were in accord. T. Jefferson, A Bill for Establishing Religious Freedom (June 12, 1779), reprinted in *id.* at 77.

adopted—including the subjective motives and comments of individual Council members and citizens—is improper.

The Court has cautioned repeatedly, and in a variety of contexts, that an otherwise constitutional statute will not be struck down on the basis of an alleged illicit legislative motive. *See Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984); *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Arizona v. California*, 283 U.S. 423, 455 n.7 (1931); *McCray v. United States*, 195 U.S. 27, 56 (1904); *Fletcher v. Peck*, 10 U.S. 87, 130 (1810). Moreover, as several Justices have observed, the task of discerning, let alone evaluating, the collection of relevant motives underlying a law is a hazardous and nearly impossible one.⁹ The legislative process is by design one of compromise, collective decision-making, and mixed motivation. The motives of individual Council members and citizens who chose to speak on the record cannot now be ascribed to the full City Council and the Mayor, who together adopted the ordinance.¹⁰ Where legitimate secular purposes for legislation have been advanced by the City and affirmed through judicial review in the courts below, the Court's inquiry into those purposes is necessarily a deferential one.

C. The City Is Not Obligated By The Constitution To Consider Religiously Motivated Exceptions To Its Regulatory Laws

That the City and the State of Florida have condoned non-sacrificial killings in no way discredits the validity of

⁹ *See Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 86-87 (1985) (Burger, C.J., dissenting); *Palmer v. Thompson*, 403 U.S. at 225 (Black, J.); *id.* at 229 (Blackmun, J., concurring); *O'Brien*, 391 U.S. at 383-84 (Warren, C.J.); *McGowan*, 366 U.S. at 469 (Frankfurter, J., concurring).

¹⁰ *See, e.g., O'Brien*, 391 U.S. at 383-84; *see also Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2488 (1991) (Scalia, J., concurring); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring); *Edwards*, 482 U.S. at 610-14 (Scalia, J., dissenting).

the Hialeah ordinances. Petitioners erroneously claim that if the ordinances recognize secular reasons for killing animals, then they must also exempt religious sacrifices. Remarkably, petitioners argue that this result is mandated by *Smith's* alleged "reinterpretation" of the unemployment compensation cases.

Smith, however, says just the opposite. *Smith* teaches that in promulgating a generally applicable regulation, a state or local government is *not* required to provide an exemption for religious practices.

Respondents in *Smith* argued that the Oregon drug law there at issue should be evaluated under the test derived from *Sherbert v. Verner*, 374 U.S. 398 (1963), *i.e.*, whether the governmental action substantially burdens a religious practice and, if so, whether the action is justified by a compelling governmental interest. This Court rejected the argument and made clear that application of the *Sherbert* test is limited to certain unemployment compensation cases and cases involving the Free Exercise Clause in conjunction with other constitutional protections. *Smith*, 494 U.S. at 881-85. Indeed, as *Smith* itself demonstrates, not even all unemployment compensation cases require the *Sherbert* test.

This case does not involve any "hybrid" constitutional claim. Petitioners challenge the Hialeah ordinances solely on Free Exercise Clause grounds.

Nor can petitioners succeed in their attempt to extend the logic of the unemployment compensation cases to animal cruelty laws. As the Court explained in *Smith*, the rationale behind the unemployment compensation cases is that the "eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." 494 U.S. at 884. But neither Florida nor Hialeah has established any regime for evaluating individual claims of entitlement to kill or sacrifice animals. The limited categories of permissible animal killing are not dependent on personal circumstances.

Moreover, each of the examples of authorized animal killings is a highly regulated activity.¹¹ The regulation of religiously motivated animal killing, by comparison, could easily run afoul of the Establishment Clause. Governmental regulation of ritual or ceremonial animal killing would "enmesh government in religious affairs," *Swaggart Ministeries v. California Board of Equalization*, 493 U.S. 378, 395 (1990), and create "comprehensive measures of surveillance and controls," *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971), on matters "of deep religious significance." *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (Powell, J., concurring).

In essence, petitioners seek not merely a religious exemption, but an unregulated, unimpeded, and unprecedented license to kill animals. Indeed, if petitioners' interpretation of *Smith* were accepted, petitioners' arguments would lead logically to the conclusion that religiously motivated human sacrifice is protected by the Free Exercise Clause. Laws forbidding human killing contain secular exceptions for, *inter alia*, war, criminal execu-

¹¹ See, *e.g.*, Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1906 (1988), 9 C.F.R. §§ 302, 313 (1992); Fla. Stat. §§ 828.22-828.26 (1990) (regulating slaughterhouses); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988); Fla. Stat. §§ 372.663, 372.671, 372.912, 372.99, 372.75, 372.85, 372.651, 372.66, 372.988, 372.5717 (1991 & 1992 Supp.); Fla. Admin. Code Ann. r. 39-13.001 to 39-13.008, 39-15.004 to 39-16.005, 39-24.002 (regulating hunting, trapping, and fishing); Fla. Stat. §§ 828.05, 828.073, 828.055, 828.058 (1991) (regulating euthanasia); Animal Welfare Act of 1970, 7 U.S.C. §§ 2131-2159 (1992), 9 C.F.R. §§ 2.30-2.38 (1992) (regulating medical research); Fla. Stat. § 482.021, 482.132, 482.071 (regulating pest control).

That the City and the State of Florida have chosen to regulate rather than outlaw these other forms of animal killing is of no consequence. Even if these animal killings posed the same threat to the community and were performed with the same level of cruelty—which they do not and are not—the Constitution does not mandate a wholesale antidote. It is sufficient for the City to address social ills one at a time. See *United States v. Lee*, 455 U.S. 252, 259 (1982); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610-11 (1935).

tions, withdrawal of life-support systems, self-defense, and defense of others. This does not mean, however, that the State must include religious practice among the acceptable grounds for killing. See *Reynolds*, 98 U.S. at 166 ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it seriously be contended that the civil government under which he lived could not interfere to prevent a sacrifice?").¹²

II. PROTECTING ANIMALS FROM UNNECESSARY KILLING OR CRUELTY IS A COMPELLING STATE INTEREST

Even assuming that the Hialeah ordinances single out religion for special treatment, their prohibitions against sacrificing animals—killings in the context of a public or private ritual or ceremony—are constitutionally justified by a compelling government interest in protecting animals from unnecessary killing or cruelty.

A. Animal Protection Laws Developed More Than A Century Ago

At common law, there was no crime of animal cruelty or unnecessary killing. D. Favre and M. Loring, *Animal Law* 122 (1983). The common law rule was first abrogated in 1641 by the Massachusetts Bay Colony, which, in its first legal code, "The Body of Liberties," prohibited "Tiranny or Crueltie towards any brute Creatures which

¹² Petitioners' unsupported assertion that "[a]ny resident of Hialeah can kill an unwanted pet in his yard or in his home, so long as he does not do so in a ritual or ceremony," Pet. Br. 13, is simply not correct. Speaking as an organization whose regional office in Tallahassee commonly works with local societies and prosecutors in Florida, *amicus* HSUS can confirm that any such incident would be investigated and referred to the state's attorney for prosecution as an unnecessary killing. By way of example, cases in Pinellas County involving a farmer killing his horse by hitting it on the head with a "2 x 4," the owner of peacocks shooting them in his backyard, and a homeowner trapping and drowning squirrels have been successfully prosecuted, apparently without reaching the appellate courts. One's own animals are not excluded from the protections of § 828.12.

are usuallie kept for man's use." S. Morison, *Builders of the Bay Colony* 232 (1930). Thus, the Bay Colony, in keeping with John Winthrop's vision of it as a "Citty upon a hill" with the eyes of all people upon it, took "first place among the governments of the Western world for having elevated mercy into law." *Id.* at 73; G. Carson, *Man, Beasts, and Gods* 71 (1972).

After the establishment of the United States, the states and territories, beginning with New York in 1828, progressively enacted anti-cruelty statutes. The most influential statute was New York's 1867 statute, upon which the anti-cruelty legislation of forty-one states and the District of Columbia has been modelled. E. Leavitt & D. Halverson, "The Evolution of Anti-Cruelty Laws in the United States," in *Animals and Their Legal Rights* 5 (4th ed. 1990). New York's 1867 statute was landmark legislation, extending its protection to all living animals, defining a broad battery of crimes (including needless killing), imposing an affirmative duty to provide food and water to any animals in human custody, and providing for enforcement by private humane agents. *Id.* at 6-7.

By 1913, every state and territory of the Union (except the Virgin Islands) had enacted basic anti-cruelty laws. Twenty-eight of these statutes expressly outlawed not only broad categories of inhumane treatment, but also, variously stated, "unnecessary," "unjustifiable," or "needless" killing of animals. E. Leavitt & D. Halverson, *supra*, 13-47. In keeping with their broad remedial purposes, the basic anti-cruelty laws were successfully applied to moderate or eliminate once-commonplace abuses of animals employed in agriculture, ranching, commerce, and transportation. R. McCrea, *The Humane Movement* 59-89 (1910). These laws, along with the rise and spread of societies for the prevention of cruelty to animals, worked substantial changes in the moral climate of this country.

B. Protecting Animals From Unnecessary Killing Or Cruelty Is A Fundamental Public Policy

In keeping with a remark attributed to Mahatma Gandhi that the moral progress of a people can be measured by its treatment of animals (see J. Wynne-Tyson, *The Extended Circle: A Dictionary of Humane Thought* 91 (1985)), a distinctive hallmark of American law and civilization is the steadily enhanced protection afforded to animals since colonial times, and the concurrent narrowing of justifications for killing or otherwise exploiting animals, even for purposes related to tangible, objectively established human needs—such as food, clothing, and health and safety. The law has long recognized animal protection laws as hallmarks of progress and as indications of a shift of public standards of behavior towards animals.

It is of common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill treatment by man.

Waters v. People, 46 P. 112, 113 (Colo. 1896); see *Stephens v. State*, 3 So. 458 (Miss. 1888) ("laws for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidence of the justice and benevolence of men").

The extended comments of the Supreme Court of Arkansas, in construing the "needless killing" provision of Arkansas' early animal protection law, confirm the sense of progress and enlightenment that these laws inspired. After a lengthy discussion of the development of anti-cruelty laws, the court noted that the laws:

must be considered wholly irrespective of property, or of the public peace, or of the inconvenience of nuisances. . . . It is in this view that such acts are

to be construed, to give them, if possible, some beneficent effect, without running into such absurdities as would in the end, make them mere dead letters So construed, this class of laws may be found useful in elevating humanity, by enlargement of its sympathy with all God's creatures, and thus society may be improved.

Grise v. State, 37 Ark. 456, 458-59 (1881).

Thus, the original anti-cruelty laws are evidence of an important and historic commitment by American society toward the general protection of animals, traditional property values and economic interests notwithstanding. Later courts simply and confidently declared the existence of a public policy against unnecessary cruelty. See *Humane Soc'y of Rochester v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *Commonwealth v. Higgins*, 178 N.E. 536, 537 (Mass. 1931). The continued advancement of this policy is reflected in the district court's opinion. See Pet. App. A44-A45.

Many states have confirmed and broadened the commitment to this public policy by going beyond the core anti-cruelty statutes to strike at customs, sports, or practices once deemed reputable, or at least not illegal, but now considered unacceptable in the twentieth century United States.¹³ Florida's body of statutory and regulatory law is itself an example of the breadth of this public policy at work.¹⁴ On a national level a series of federal laws

¹³ For example, forty-two states now not only outlaw dogfighting but punish the offense as a felony. Cockfighting is specifically outlawed in forty-four states. C. Stevens & D. Halverson, "Fighting and Baiting," in *Animals and Their Legal Rights* 152-53 (4th ed. 1990).

¹⁴ "Kindness to animals" is an expressly required part of the public school curriculum. Fla. Stat. Ann. § 233.061 (1992 Supp.). State educational policy forbids dissection of live animals as well as physical harm to animals used in school biology experiments, encourages observational studies of animals, and requires live animals used in schools to be housed and cared for humanely. Fla. Stat. Ann. § 233.0674 (1989). Sterilization of dogs and cats released from animal shelters is required to reduce unwanted surplus animals and the "privation and death" suffered by such animals. Fla. Stat.

has clearly established and embodied a federal public policy in favor of the protection of animals from cruelty.¹⁵

Underscoring the public policy favoring animal protection in this country are the legislative grants of special police powers to private humane societies to enforce the anti-cruelty laws, in addition to the normal enforcement jurisdiction residing in local police and prosecutors.¹⁶ This double-layering of enforcement systems is a further testament to the importance of animal protection in the legal culture of this country, and is a feature virtually unique to animal protection law. Indeed, the depth of public commitment to the efforts begun by the Massachusetts Bay Colony is evidenced by the public willingness to sup-

Ann. § 823.15 (1992 Supp.). Humane methods of euthanasia of shelter animals are mandated and specified. Fla. Stat. Ann. § 828.058 (1992 Supp.). Fighting or baiting animals is a felony. Fla. Stat. Ann. § 828.122 (1992 Supp.). A civil statute, apparently grounded in the notion that animals, like children, are ultimately wards of the state, provides for seizure and custody of abused or neglected animals pending a hearing in court to determine whether the owner is able to provide adequately for the animal and is fit to have custody of the animal. Fla. Stat. Ann. § 828.073 (1992 Supp.) Steel-jaw leghold traps are banned throughout the State. Fla. Admin. Code Ann. r. 39-24.002(3) (1991).

¹⁵ See, e.g., Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1992); Twenty-Eight Hour Law, 45 U.S.C. §§ 71-74 (1988); Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1906 (1988); Horse Protection Act, 15 U.S.C. §§ 1821-1830 (1988); Wild and Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1988 & 1990 Supp.); and Marine Mammals Protection Act, 16 U.S.C. §§ 1361-1407 (1988 & 1990 Supp.).

¹⁶ The degree of such private enforcement authority ranges from the power to investigate and collect evidence to assist prosecutorial efforts, see Cal. Corp. Code § 10404 (West 1991), Fla. Stat. Ann. § 828.03 (1992 Supp.), to the seizure of abused animals, with or without a warrant, see Fla. Stat. Ann. § 828.073 (1992 Supp.); N.Y. Agric. & Mkts. Law § 373 (McKinney 1991); Va. Code Ann. § 3.1-796.115 (1991 Supp.), to full investigatory and arrest powers, see D.C. Code Ann. § 22-806 (1981); N.Y. Agric. & Mkts. Law § 371 (McKinney 1991); Va. Code Ann. § 3.1-796.109 (1991 Supp.), to the hiring of private prosecutors to prosecute animal cruelty offenders without assent from district attorneys. See Ohio Rev. Code Ann. § 2931.18 (1991 Supp.).

port the more than two thousand animal protection organizations that exist in the United States today.

C. Statutes Protecting Animals Directly Serve The State Interest In Preserving Public Morals And Protecting Human Life

Underlying petitioners' arguments about the compelling state interest test is the erroneous assumption that a broad and definite line separates the state interest in human life, safety, and health from the state interest in animal life. This assumption in turn lays the groundwork for a false balancing test wherein *any* free exercise interests of *any* religion must perforce outweigh the state interest in protecting animals. The courts have not agreed with that assumption.

For over a century, American jurisprudence has acknowledged that laws protecting animals from cruelty are justified by the link between such cruelty and violence among humans. Such laws tend to lessen violence and brutality in society by suppressing conduct that desensitizes human sympathies and devalues sentient life. In *Stephens v. State*, 3 So. 458 (Miss. 1888), the court noted:

Cruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. . . . Often their beauty, gentleness and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes; if for no other reason than to learn how to be kind and just to each other.

Id. at 459. Other cases echo this concern. In holding that setting hounds upon a fox constituted the crime of abetting unnecessary suffering or cruelty, the Supreme Judicial Court of Massachusetts stated: "The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt." *Commonwealth v.*

Turner, 14 N.E. 130, 132 (Mass. 1887). In an earlier Massachusetts case, *Commonwealth v. Tilton*, 49 Mass. (8 Met.) 232 (1844), Chief Justice Shaw described cock-fighting

[a]s being barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it

Id. at 234-35; see *State v. Porter*, 16 S.E. 915 (N.C. 1893); *Hunt v. State*, 29 N.E. 933 (Ind. App. 1892). In *Waters v. People*, 46 P. at 113, the Colorado Supreme Court upheld a conviction for the "needless" mutilation and killing of doves by a gun club, noting that the aim of the state's anti-cruelty law "is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation."

The link between permitting violence toward animals and engendering violence toward human beings, which nineteenth century jurists readily accepted, is confirmed by modern sociological research. A growing body of evidence suggests that violence toward animals in childhood may be a leading indicator and precursor of adult criminal and antisocial behavior, that animal abuse within families often goes hand in hand with spousal and child abuse, that permitting a child to abuse animals without punishment or correction can lead to progressively more violent and antisocial acts as the child develops, and that children exposed to animal abuse are being taught to devalue sentient life. See generally American Humane Association, *Report on the Summit on Violence Towards Children and Animals* (1991); R. Lockwood and G. Hodge, "The Tangled Web of Animal Abuse: The Links Between Cruelty to Animals and Human Violence," 31 *Humane Society News* No. 3, at 10 (Summer 1986). As the district court found, "[t]he evidence at trial established that exposure to the ritual sacrifice of animals imperils the psychological well-being of children and increases the likelihood that a child will become more aggressive and violent." Pet. App. A44.

Thus, the state interest in protecting animals from cruelty and unnecessary death is part and parcel of the broader, irreducible, and paramount state interest in societal peace, order, health, and safety. It is against *that* very concrete interest that petitioners' desire to kill animals for reasons of abstract religious ideology must be weighed.

D. The Lawful Purposes For Killing Animals Do Not Make The Public Policy Against Unnecessary Killing Or Cruelty Any Less Compelling

Petitioners contend that no generally applicable ban on killing animals exists in Hialeah or Florida. See Pet. Br. 12. They then list a number of purposes for which Florida law expressly permits animals to be killed, raise a number of hypothetical situations involving the killing of animals for which no reported prosecutions can be found,¹⁷ and then conclude that religious faith is "almost the only unacceptable reason" for killing animals in Florida, arguing both that "[t]his is rank discrimination against religion," *id.* at 13, and that the various lawful purposes for killing or inflicting pain upon animals decisively undermine any compelling state interest, *id.* at 37-40. A fair and comprehensive reading of Florida's laws relating to animals belies these contentions.

First, Florida's anti-cruelty statute, Fla. Stat. Ann. § 828.12, upon which the Hialeah ordinances are based, is a general ban on killing (as well as tormenting, overworking, beating, or mutilating) animals in the State,

¹⁷ The absence of reported prosecutions of particular kinds of abuses proves little, since the vast majority of cruelty cases are resolved at the field level by humane investigators delivering a warning of possible prosecution or educating the perpetrator. In 1907, *amicus* ASPCA, out of 6,567 complaints of cruelty received and investigated, made arrests and prosecutions in 1,015, a typical percentage. R. McCrea, *The Humane Movement*, 63-65 (1910). This pattern continues to hold today. E. Leavitt & D. Halverson, "Animal Protective Organizations and Law Enforcement Agencies," *Animals and Their Legal Rights* 258 (4th ed. 1990); ASPCA, 1990 Annual Report 9.

qualified only by reasons of necessity. By force of the definitional section, Fla. Stat. Ann. § 828.02 (1976), the ban protects "every living dumb [*i.e.*, nonhuman] creature." The statute could not be more generally applicable on its face.

Second, the various *de jure* exceptions to the general ban are almost invariably related to basic, tangible, objectively established human needs (food, clothing, the prevention or treatment of disease), which in turn are grounded in the same, overriding policy considerations of public health, safety, and order, in the face of which religious practices must yield.

Florida, like many other states, excepts otherwise cruel acts done "in the interest of medical science" from the coverage of the anti-cruelty statute. Fla. Stat. Ann. § 828.02. Such provisions reflect a policy judgment by the legislatures of the overriding importance of regulated biomedical research in the prevention and treatment of diseases, both human and animal.

Hunting is a traditional food-gathering activity that continues to be practiced as such. Obtaining meat remains the reason most frequently offered by hunters for this activity.¹⁸ The Florida Game and Fresh Water Fish Commission in Florida (not hunting, fishing, and trapping *per se*, as the Church would have it, *see* Pet. Br. 12), does have constitutional status by force of Article IV, § 9 of the Florida Constitution. However, "management, protection, and conservation of wild animal life and fresh water aquatic life" are the only purposes alluded to in § 9, not recreation. Indeed, a rationale for hunting often echoed by state fish and game authorities, and hunting organizations, is the prevention of crowding, disease, and malnutrition caused by overpopulation. *See, e.g., Holbrook Island Sanctuary v. Inhabitants of Town of Brooksville*, 214 A.2d 660, 664 (Me. 1965);

¹⁸ S. Kellert, "Attitudes and Characteristics of Hunters and Anti-Hunters and Related Policy Suggestions" (paper presented to the U.S. Fish and Wildlife Service (1976) and to the Hunter Safety Education Conference, Charleston, S.C. (1978)).

W. Robinson, "The Case for Hunting," and H. Nelson, "The Case for Hunting on National Wildlife Refuges," in *Advances in Animal Welfare Science 1986/87* 273 and 283 (M. Fox & L. Mickley eds., 1986). It is thus simplistic to contend that hunting, fishing, and trapping, as administered by the states, represent a fatal inconsistency to the existence of a humane public policy. Moreover, sport hunting has been under increasing attack over the past thirty years as public sensibilities toward animals continue to evolve. This phenomenon is itself a testament to the protective public policy towards animals.

Laws permitting discretionary euthanasia of injured, sick, or abandoned animals, *see e.g.*, Fla. Stat. Ann. §§ 828.05, 828.055, 828.058, spring from and promote the public policy of humane animal treatment. Contrary to petitioners' argument, Pet. Br. 13, the purpose of these statutes—to terminate or prevent animal suffering—is hardly inconsistent with such a policy. Sections 828.02 and 482.021 allow the extirpation of vermin, and are obviously grounded in fundamental considerations of health, safety, and protection of property.

As a reflection of public policy, then, the corpus of Florida law relating to animals is most accurately described as imposing a general condemnation against killing or abusing animals without necessity—the historic anti-cruelty statute. That general condemnation has been reinforced by an accretion of specialized statutes targeting particular abuses such as animal fighting, providing procedures for removing animals from unworthy owners, administering the shelter system, and mandating humane education. Deviations from this protective statutory structure are not arbitrarily permitted, but either relate to basic human needs—food, clothing, disease prevention and treatment, protection of property—or spring from the same public policy of humane treatment—euthanasia of unwanted or injured animals. Thus, the exceptions serve the same overriding state interests in human health, safety, and public order to which religious practices themselves must yield.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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